

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

**DETERMINATION OF RATES AND
TERMS FOR DIGITAL PERFORMANCE
OF SOUND RECORDINGS AND MAKING
OF EPHEMERAL COPIES TO
FACILITATE PERFORMANCES (*WEB V*)**

**Docket No. 19-CRB-0005-WR
(2021-2025)**

**THE NATIONAL RELIGIOUS BROADCASTERS
NONCOMMERCIAL MUSIC LICENSE COMMITTEE'S SUBMISSION OF
AMENDED WRITTEN DIRECT TESTIMONY OF RICHARD STEINBERG**

The National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”), including Educational Media Foundation, hereby respectfully submits the following Amended Written Direct Testimony of Richard Steinberg in the above-captioned matter.

Pursuant to 37 C.F.R. § 351.4(c), Professor Steinberg’s amended written direct testimony includes an expanded Section IV.B, which discusses two noncommercial settlement agreements for 2021-2025 that license webcasting of sound recordings and related ephemeral recordings by certain noncommercial webcasters under the statutory licenses in 17 U.S.C. sections 112 and 114. These agreements were entered into by SoundExchange, Inc. (“SoundExchange”) with (a) College Broadcasters, Inc. (CBI) and (b) National Public Radio and the Corporation for Public Broadcasting (collectively “NPR”). The NRBNMLC requested these agreements and related negotiation and valuation documents during discovery. SoundExchange agreed to produce at least some documents related to these agreements but, as of the date of this filing, has not yet done so. There also may be other documents related to noncommercial issues that SoundExchange has not yet produced. The NRBNMLC thus may seek to file further amended

testimony once the relevant witnesses have had a reasonable opportunity to review any such documents.¹

Professor Steinberg's amended written direct testimony is attached as Exhibit A hereto, and, for the convenience of the Copyright Royalty Judges, a redlined version showing the changes made from his originally filed testimony is attached as Exhibit B hereto. The CBI-SoundExchange agreement is attached as Exhibit C hereto (NRBNMLC Ex. 20), and the NPR-SoundExchange agreement is attached as Exhibit D hereto (NRBNMLC Ex. 21).

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December 11, 2019

¹ Professor Steinberg's amended testimony also includes correction of a few typos.

EXHIBIT A

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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(*WEB V*)**

**Docket No. 19-CRB-0005-WR
(2021-2025)**

**AMENDED WRITTEN DIRECT TESTIMONY OF
RICHARD STEINBERG,**

**Professor of Economics and Philanthropic Studies
The Lilly Family School of Philanthropy
on the IUPUI campus of Indiana University**

**(On behalf of the National Religious Broadcasters
Noncommercial Music License Committee)**

December 11, 2019

TABLE OF CONTENTS

	<u>Page</u>
I. QUALIFICATIONS AND ASSIGNMENT.....	1
A. Qualifications.....	1
B. Assignment	3
II. PRIOR RULINGS OF THE JUDGES.....	5
III. WILL THE NONCOMMERCIAL EDUCATIONAL AND COMMERCIAL WEBCASTING MARKETS CONVERGE AND OVERLAP WHEN NONCOMMERCIAL EDUCATIONAL LISTENERSHIP RISES?.....	6
A. Background.....	7
B. NCE Webcasters Constitute a Distinct Market Segment that Does Not Compete or Overlap with the Commercial Segment Regardless of Market Size.....	10
C. Charging Commercial Rates for NCE Performances Exceeding an ATH Threshold Is Unwarranted.....	12
D. Charging Commercial Rates for NCE Performances Exceeding an ATH Threshold has Harmful Side Effects	14
IV. NONCOMMERCIAL EDUCATIONAL BROADCASTERS SHOULD ENJOY LOWER-THAN-COMMERCIAL RATES As the outcome of transactions between willing buyers and willing sellers.	15
A. By Prior Rulings of the Judges	15
B. By Revealed Preference	15
C. By Economic Practice in a Variety of Contexts	20
D. Lower-than-Commercial Royalty Rates Will Not Cannibalize the Commercial Submarket	21
V. CHARACTERISTICS OF REASONABLE RATE PROPOSALS	27
A. Flat Fees, or Tiered Flat Fees Should be Employed	27
B. If the Judges Reject Tiered Flat Fees Entirely, or if they Select Tiered Flat Fees and Rates, NCE Rates for Usage in Excess of Some Threshold Should be Lower than Commercial Rates.	29

C.	If the Judges Reject Tiered Flat Fees, then Whether an NCE Exceeds Some Threshold Should Be Evaluated on an Annual, Rather than Monthly Basis.	31
D.	If the Judges Reject Tiered Flat fees, then the Listenership Threshold for paying Usage Rates Should be Increased.	31
VI.	References	32
VII.	Appendix: Works Consulted	34

I. QUALIFICATIONS AND ASSIGNMENT

A. Qualifications

1. My name is Richard Steinberg. I am a Professor of Economics in the School of Liberal Arts and Professor of Philanthropic Studies in the Lilly Family School of Philanthropy at Indiana University Purdue University Indianapolis (IUPUI), which Schools reside in the Indiana University system and are located in Indianapolis, IN. I graduated from MIT with an S.B. degree in Economics and received my Ph.D. in Economics from the University of Pennsylvania in 1984. Almost all of my research concerns nonprofit organizations and philanthropic behaviors.
2. I have spent my career developing this field of study, first at the Department of Economics at Virginia Tech, then while a member of the Center on Philanthropy at IUPUI, which later became the Lilly Family School of Philanthropy. While there, I helped develop three interdisciplinary graduate degree programs (M.A. in Philanthropic Studies, M.P.A. with concentration in Nonprofit Management, and Ph.D. in Philanthropic Studies) and regularly teach a required doctoral course and required option at the masters level (they must take either my course or a course in Nonprofit Law). I served as Chair of the Faculty in Philanthropic Studies from 1997-99; proposed the first longitudinal study of individual giving and volunteering, the Philanthropy Panel Study, a module appended to the biennial Panel Study on Income Dynamics at the University of Michigan, and helped with its development; and founded a weekly seminar (the Philanthropy Research Workshop) for the faculty and students in Philanthropic Studies where authors discuss their research in progress.
3. I am the author or editor of five books, of which the most relevant is the just published *Economics for Nonprofit Managers and Social Entrepreneurs* (Edward Elgar, 2019, with

coauthors D.R. Young, R. Emanuele, and W. Simmons). I have also coedited the authoritative reference work, *The Nonprofit Sector: A Research Handbook*, 2nd Ed. (Yale University Press, 2006, Walter W. Powell coeditor) and authored the chapter Economic Theories of Nonprofit Organizations therein. I am the author or coauthor of 29 publications in refereed academic journals, including *The American Economic Review*, *The Rand Journal of Economics*, *Journal of Public Economics*, *National Tax Journal*, *Nonprofit and Voluntary Sector Quarterly*, *Nonprofit Management and Leadership*, and *Voluntas*. The following articles or book chapters help to establish my expertise on nonprofit pricing and competition between and among nonprofit and for-profit organizations:

- Steinberg, R. (1991) “‘Unfair’ Competition by Nonprofits and Tax Policy,” *National Tax Journal*, 44#3
- Steinberg, R. and B. Galle. (2018) A Law and Economics Perspective on Nonprofit Organizations. in M. Harding (ed.) *Research Handbook on Not-for-Profit Law* (Edward Elgar).
- Steinberg, R. (2006). Membership Income. In D.R. Young (ed.) *Financing Nonprofits: Putting Theory Into Practice*. Altamira Press and the National Center for Nonprofit Enterprise.
- Steinberg, R. and B.A. Weisbrod (1998). Pricing and Rationing by Nonprofit Organizations with Distributional Objectives. In B.A. Weisbrod (ed.) *To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector*. Cambridge University Press.
- Steinberg, R. (1997). Competition in Contracted Markets. In P. 6 and J. Kendall (eds.) *The Contract Culture in Public Services*. Ashgate.

4. I have served the development of my field as President of The Association for Research on Nonprofit Organizations and Voluntary Action (ARNOVA), the primary multidisciplinary academic society; as a member of the Governing Council at the Aspen Institute Nonprofit Sector Research Fund; as a research consultant for the Project on the Growing Commercialism of Nonprofit Organizations (at Northwestern U.); and as a member of

several academic journal editorial boards. I was recognized by my appearance on the Power and Influence Top 50 list by the *Nonprofit Times* in 1998. I have testified before the U.S. Congress on competition between nonprofits and for-profits.

5. I was an expert witness before the U.S. tax court in the case of *United Cancer Council v. Commissioner of the IRS* (concerning revocation of tax-exempt status). At trial, lawyers for the IRS challenged my expertise and the judge ruled that I qualify as an expert witness on nonprofit organizations and charitable fundraising. I have also served as an expert witness in 3 cases on valuing economic damages, 11 cases on state regulation of fundraising, 1 case on interpretation of nonprofit status in the Commonwealth of Puerto Rico, and 1 case of wrongful dismissal of a nonprofit CEO.

B. Assignment

6. I have been asked to consider and discuss the characteristics of nonprofit organizations and differences between nonprofit and for-profit organizations and assess whether these differences warrant different sound recording royalty rates for nonprofit than for-profit webcasting organizations and/or a difference in the way those rates are structured.
7. In undertaking this analysis, I have read Laws, Final Orders of the Copyright Royalty Judges, the Copyright Arbitration Royalty Panel Report in a prior webcasting proceeding, and the testimony of various witnesses and have accessed web sites and IRS Forms 990. The list of materials that I considered in preparing this written direct testimony is attached as an Appendix. I also refer to several articles and books listed in the Reference section of this testimony.
8. The structure of this testimony is as follows. In Section 2, I summarize prior Copyright Royalty Judge rulings that are relevant to the issues I am considering, as I understand them.

In Section 3, I discuss reasons why the right to perform sound recordings in commercial webcasts and the right to perform sound recordings in noncommercial educational¹ webcasts are separate markets (or market segments, if you prefer) and show that listenership levels have nothing to do with this separation. In Section 4 I argue that sound recording royalties for noncommercial educational webcasting should be levied at lower-than-commercial rates and rebut the assertion that lower rates would cannibalize the commercial market. In the concluding section, I characterize a series of reasonable proposals for noncommercial fee structures and rates, offering fallback options if the Judges ultimately accept some of my arguments and reject others.

9. This amended testimony includes an expanded Section IV.B, which discusses two noncommercial settlement agreements covering NCE statutory webcasting of sound recordings and related ephemeral recordings for 2021-2025 that SoundExchange entered into with College Broadcasters, Inc. (CBI) and NPR, consisting of National Public Radio and the Corporation for Public Broadcasting, that I did not have access to at the time I finalized my Written Direct Testimony. I understand that the NRBNMLC requested these agreements and related negotiation and valuation documents during discovery and that SoundExchange has agreed to search for and produce at least some such documents. As of the date of this amended testimony, however, I have not yet had access to those documents. I reserve the

¹ I understand that the Judges have used the term “noncommercial educational” to refer specifically to noncommercial webcasters that meet five conditions listed in 37 C.F.R. Part 380 Subpart C. These are webcasting channels affiliated with accredited post-secondary educational institutions whose operations are staffed substantially by students. In contrast, I use the term, usually abbreviated as NCE, to mean organizations defined by the Federal Communications Commission in 47 USC § 397(6). These are radio broadcast stations that are eligible to be licensed by the Commission as a noncommercial educational radio broadcast station and are owned and operated by a public agency or nonprofit private foundation, corporation, or association. Thus, in addition to stations meeting the CRB definition of the term, I include nonprofit religious and public radio stations that advance an educational purpose and follow FCC requirements to be so licensed. In turn, I refer to webcasting conducted by NCE broadcasters as NCE webcasting.

right to amend my testimony further in light of these and any other noncommercial documents that SoundExchange produces after the close of discovery once I have had a reasonable opportunity to review them.

II. PRIOR RULINGS OF THE JUDGES

10. In preparing my testimony, I have read prior rulings of the Judges and rely upon my understanding of their rulings. I will not retrench this ground and include this discussion only as background. First, I understand that there is legislative guidance provided to the CRB that the Judges must set rates in accordance with those that would emerge from agreements between willing buyers and sellers absent the statutory license. Guidance since then has provided more detail – the willing traders operate in a “workably” or “reasonably” competitive market. The operational definition of “reasonably competitive” has evolved from “bargaining from a position of equal power” to a market reflecting significant price competition among sellers. *See* Web IV, 81 Fed. Reg. at 26344 (finding that a “market where record companies did not engage in price competition was not effectively competitive”); *ibid.* (“Thus the rate set in Dr. Rubinfeld’s upstream interactive benchmark market can and should be adjusted to reflect such price competition, in order to render it [a]s usable as an “effectively competitive” rate in the segment of the market to which that benchmark applies – the noninteractive subscription market.”) The buyer in this hypothetical deal is the webcasting service and the sellers are the record companies. The current statutory rate structure offers noncommercial webcasters lower average rates because listenership levels below a monthly aggregate tuning hours (ATH) of 159,140 require payment of a flat \$500 fee, with commercial rates applicable for listenership above that threshold. Finally, rights to

make ephemeral recordings that are needed for webcasting are paid together with digital broadcast rights, amounting to 5% of the fees detailed above.

III. WILL THE NONCOMMERCIAL EDUCATIONAL AND COMMERCIAL WEBCASTING MARKETS CONVERGE AND OVERLAP WHEN NONCOMMERCIAL EDUCATIONAL LISTENERSHIP RISES?

11. Noncommercial educational (NCE) broadcasters are licensed by the FCC to operate as noncommercial educational radio stations if they meet operational and ownership restrictions discussed below. I understand that virtually all noncommercial broadcasters represented by the NRBNMLC broadcast under noncommercial educational broadcast licenses granted by the FCC and that virtually all of the webcasting conducted by NCE broadcasters consists of online simulcasting. I therefore focus my testimony on the NCE portion of the noncommercial webcasting population.
12. The Judges have expressed the view that noncommercial webcasters, including those with NCE broadcast licenses, constitute a distinct market segment and that the distinction between NCE and commercial webcasts should be protected. I wholeheartedly agree. Where we disagree is on whether listenership levels are any part of what makes NCE webcasters distinct, and therefore on whether listenership-based imposition of commercial rates above certain levels helps to keep those markets from overlapping. In subsection A below, I provide background on why NCE webcasters are different from commercial webcasters. In subsection B, I show that these differences imply that NCE webcasts constitute a distinct market (or market segment) regardless of listenership. Subsection C shows that imposing commercial rates on NCE webcasters above a certain ATH threshold is unwarranted, and subsection D shows that such an imposition has harmful side effects on the charitable mission of NCE webcasters.

A. Background

13. NCE webcasters are without exception donative nonprofit organizations that are both noncommercial and educational in nature. In this subsection, I will elaborate on the nature of nonprofit organizations, the distinction between donative and commercial nonprofits, and FCC conditions for granting NCE status to a broadcaster.
14. Nonprofit organizations are chartered by the states under a variety of names (not-for-profit, nonprofit, eleemosynary, etc.). Yale Law and Economics Professor Henry Hansmann (1980) found that all state nonprofit corporation statutes shared the restriction that their profits cannot be distributed, labeling this the “nondistribution constraint.”² This distinction has been accepted as the defining characteristic of “nonprofit” in virtually all the subsequent academic literature. The nondistribution constraint ensures that all financial surplus (generated through donations, sales of goods and services, and various other minor revenue sources) is dedicated to the charitable mission of the organization. Even on dissolution, remaining financial surplus must be donated to another nonprofit organization with the closest possible mission to ensure that no financial surplus inures to the benefit of anyone who controls the use of organizational assets (e.g., Brody 2006).
15. Organizations precluded from distributing profits have different objectives, constraints, and revenue sources than for-profit enterprises (e.g., Steinberg 2006). These differences affect nonprofit willingness-to-buy and thus affect the price in contracts between willing buyers and

² “A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees. By “net earnings” I mean here pure profits - that is, earnings in excess of the amount needed to pay for services rendered to the organization; in general, a nonprofit is free to pay reasonable compensation to any person for labor or capital that he provides, whether or not that person exercises some control over the organization.” (Hansmann, *The Role of Nonprofit Enterprise*, at 835).

willing sellers. Specifically, nonprofits are mission-, rather than profit-driven. With no shareholders demanding return on their investment, nonprofits are free to pursue their charitable and educational missions subject only to the need to remain solvent. There is no financially motivated market for the control of nonprofit organizations because ownership rights cannot be sold at a profit without violating the nondistribution constraint. Hence, the threat of takeover bids does not force nonprofits to compromise their mission in order to obtain higher profits. Nonprofit organizations cannot issue meaningful shares of stock to raise capital (because receipt of dividends or capital gains would represent a distribution of profits) but can obtain donations (because donors are assured that no portion of their donations will be distributed to owners). Both nondistribution of profits and the resulting noncommercial activities of nonprofit organizations provide important signals to stakeholders that the organization is sincerely pursuing its charitable and educational missions. This last point is particularly relevant for religious webcasters, as I will show when I turn from general background to the separation between NCE and commercial webcaster markets.

16. In general, nonprofit organizations receive revenues from a variety of sources: gifts, grants, and contributions; sales of goods and services; returns on endowment and reserve funds; property rentals; royalties; and several other minor categories. Hansmann (1980) observed that few nonprofit organizations have an equal mix of donations and sales, labeling those nonprofits that receive the bulk of their revenues from gifts, grants, and donations “donative nonprofits” and those that receive the bulk of their revenues from sales of goods and services and government contracts as “commercial nonprofits.” Nonprofit webcasters are clearly

donative nonprofits, receiving almost all their revenues from listener donations.³ This is particularly true for NCE webcasters, who are prohibited from obtaining advertising revenues from their broadcast programming so that their simulcasts streams are similarly devoid of such commercial content.

17. Donative nonprofit organizations suffer from “philanthropic insufficiency” (Salamon, 1986) due to the well-known free rider problem.⁴ Specifically, donors are contributing to a collective good (also known as a “public good”) where one donor’s consumption of that good (furthering the nonprofit mission) is nonrival with other donors’ consumption. Anyone can consume the results of total donations (religious broadcasting and webcasting) whether they have personally contributed or not, so that there is a natural tendency to let others donate while taking a free ride on the output. As a result, and with rare exceptions, donative nonprofits are bare-bones operations that often struggle to survive.
18. NCE broadcasters are prohibited from allowing advertising (47 U.S.C. section 399b). The regulations provide that “No *promotional* announcement *on behalf of for profit entities* shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees. However, acknowledgements of contributions can

³ Some of their financial support comes in the form of cost-sharing, which is essentially equivalent to a voluntary donation, even though it is listed separately in the informational tax returns (Form 990) filed by most nonprofits. Cost-sharing includes free or reduced-cost use of facilities (perhaps provided by a sponsoring Church in the case of noncommercial religious broadcasters) and either for-profit or nonprofit underwriting.

⁴ In game-theoretic economic terms, the free-rider problem is that Nash-equilibrium total donations are suboptimal; a higher level of average giving would improve the collective output in a way that would make all donors better off. The free-rider problem is less severe when donors receive “warm glow” from the act of giving that is distinct from their utility from consuming the collective good. (Andreoni, J. (1990). Impure altruism and donations to public goods: A theory of warm-glow giving. Cornes, R., & Sandler, T. (1996). *The theory of externalities, public goods, and club goods*.). It is also less severe because the nondistribution constraint solves the related principal-agent problem that donors would otherwise not know whether their gift supported increases in the collective good or increases in shareholder dividends (Bilodeau, M., & Slivinski, A. (1998). Rational nonprofit entrepreneurship). But the problem remains substantial, as any listener to NPR pledge drives knows.

be made. *The scheduling of any announcements and acknowledgements may not interrupt regular programming, except as permitted under paragraph (e) of this section*” [referring to on-air fundraising activities]. 47 CFR §73.503(d) (emphasis in original). In addition, NCE licensees must be educational nonprofits and show that their station will be used to advance an educational program (47 USC §397; *see also* 47 USC §396 and 47 CFR §73.503(a)).

B. NCE Webcasters Constitute a Distinct Market Segment that Does Not Compete or Overlap with the Commercial Segment Regardless of Market Size

19. Commercial webcasters solve a standard economics problem in deciding whether to buy performance and ephemeral copy licenses from the record companies. Willingness to buy is based solely on profit maximization, which requires picking a mix of songs, broadcast and webcast options, and formats that maximize the listening audience. This is because advertising revenue is directly proportional to listenership. In contrast, NCE webcasters solve a different economics problem, that of mission maximization.⁵ NCE willingness to buy is based on choosing the song mix, webcast options, and formats that best advance the educational and charitable mission of the station. It is important that the NCE attract the right kind of listener, listening for the right reasons, and changing behaviors, knowledge, and beliefs in response to what they hear. Popular songs that bring in lots of listeners but do not advance the educational mission will not be selected, especially so because NCE webcasters are prohibited from monetizing listenership through advertising. This reduces NCE ability

⁵ Economist Estelle James (1983) developed an appropriate model based on mission maximization. Her nonprofit organizations had preferences over activities, classified into favored (the activity advances the mission directly), neutral (the activity does not advance the mission directly but generates net revenues that can be devoted to the mission) and disfavored activities (those that directly hinder the mission but are sufficiently lucrative that they can advance the mission by generated revenues). The quantity of favored activity selected by nonprofits exceeds the quantity that would maximize profits, and any losses from the favored activity are cross-subsidized by net revenues from neutral and disfavored activities. In the NCE context, educational and religious messages are the favored activity, and fundraising is a disfavored activity since it uses up on-air time that would otherwise be devoted to promoting the educational and religious mission.

and hence willingness to pay to a level that is significantly below that of commercial for-profit webcasters.

20. Commercial webcasters profit from advertising revenues that depend proportionally on their listenership, but listeners otherwise play no role in profit maximization. In contrast, NCE webcasters receive the bulk of their revenues from donors including listener-donors during or in response to on-air fund drives. Donations may go up when the number of *broadcast* listeners increase, but we do not have any reason to believe that donations are proportional to broadcast listenership. More importantly, it is unclear whether donations increase at all in response to *webcast* listenership, as at least for NRBNMLC webcasters virtually all, if not all webcasting is in the form of simulcasting (this is probably also true for other NCE webcasters, but I have less information about them). Typically, those who listen to simulcasts also listen to broadcasts when radios are available and they are within broadcast range, and on-air fundraising drives are pervasive enough that these listener-donors would give regardless of whether they heard about the drive in a simulcast. In sum, NCE ability to pay royalty fees does not increase proportionally with webcast listenership. Hence Mr. Gene Henes, a witness presented by the NRBNMLC in a prior webcasting proceeding, testified “When our support does not increase in proportion with our listenership, it is fundamentally unfair that our expenses should do so.” (Henes WDT Web IV, ¶ 26. A similar point is made in Emert Web IV WDT ¶ 37).

21. A final reason why NCE willingness to pay royalties is lower than that of commercial webcasters stems from the economic incidence of royalty fees. Economic incidence concerns the ultimate bearer of burdens after costs are transferred the original payor in the form of higher consumer prices, higher advertising prices, lower worker wages, or lower financial

returns to shareholders. Commercial webcasters distribute the profits generated from license rights to shareholders, so that shareholders bear the ultimate burden of paying royalty fees.⁶ Shareholders who do not want to bear this burden can simply sell their shares, so we are left with owners who are willing to pay any increase in royalty fees.

22. In contrast, royalty fees paid by NCEs come at the expense of donors and other stakeholders that care about the organization's charitable and educational mission. Organizational expenditures on mission consist of donations minus fees for the rights to webcast recordings (and other expenses, of course), so that donors would have to give more to accomplish the same outcome when royalty fees go up. Other stakeholders who support the charitable and educational mission are also burdened to the extent that increased donations do not cover increased royalty fees. These burdens cannot be transferred to others who are more willing to pay for increased royalty fees, so that NCE willingness to pay is correspondingly lower.

C. Charging Commercial Rates for NCE Performances Exceeding an ATH Threshold Is Unwarranted

23. The Judges in their Web II CRB Final Order acknowledge that there is "a distinct noncommercial submarket in which willing buyers and willing sellers would have a meeting of the minds that would result in a lower rate than the rate applicable to the general commercial webcasting market" and that "members of the noncommercial submarket, by definition, are not serious competitors with commercial webcasters" (72 Fed. Reg. 24084, 24100 (May 1, 2007)). They further state that "Mere size alone, without evidence of the other

⁶ Consumers do not pay for webcasts, so bear none of the burden of licensing fees. Advertisers also bear none of the burden because the amount of advertising revenue received is insensitive to the structure of royalty fees. Advertisers are charged the maximum they are willing to pay when royalty fees are low, and they are willing to pay the same maximum amount when royalty fees are high. Worker wages are set by competitive labor markets and hence do not change when royalty fees change. Hence, the sole incidence of licensing fees lies on shareholders.

characteristics that define membership in the noncommercial submarket discussed supra at Section IV.C.2.a., does not make a webcaster eligible for this lower rate.” (*Ibid.*)

24. It is therefore puzzling that the Judges selected performances above an ATH level as “a proxy for assessing the convergence point between Noncommercial Webcasters and Commercial Webcasters.” (*Ibid.*) If small size alone is insufficient to warrant distinct rates, then large size alone is insufficient to warrant identical rates that apply to streaming above the ATH threshold. None of the differences between NCE and Commercial webcasters discussed above changes when an NCE webcaster exceeds the number of listeners measured by the ATH. These differences exist and persist at all levels of listenership. Therefore, the penalty for alleged convergence (payment of commercial rates) is unrelated to any actual convergence.
25. The Judges had a difficult task reconciling the competing claims about the law and economics of price discrimination in royalty markets. Overall, I am impressed with the quality of the final determinations, but respectfully disagree with the portions of those determinations that discuss convergence. Perhaps the Judges were implicitly referring to a point developed elsewhere, the possibility that NCEs will cannibalize the commercial market when listenership exceeds 159,140 monthly ATH. One might rephrase the cannibalization point as “although NCEs constitute a distinct submarket at any level of ATH, this submarket endangers the commercial submarket when ATH is large.” However, I will argue below that the cannibalization argument is unsupported by the record and unlikely to occur. I therefore conclude that to the extent that convergence and overlap become a problem, commercial rates beyond an ATH threshold is not the solution.

D. Charging Commercial Rates for NCE Performances Exceeding an ATH Threshold has Harmful Side Effects

26. When an NCE webcaster's listenership approaches the ATH cap, they must consider whether to continue to allow listenership to increase and pay inappropriately high rates for doing so in order to pursue their charitable and educational mission, or limit access to webcasts and hence compromise their mission. The problem has already occurred. Joseph C. Emert, the President of Life Radio Ministries, Inc. testified in Web IV:

"I also am aware of noncommercial broadcasters who do stream, but they impose caps on the number of listeners their programming may reach to stay under the listenership level at which usage fees are owed. It is obviously not ideal for a noncommercial religious broadcaster to turn listeners away from their programming, as it works against our mission of reaching as many people as we can with our message of hope and inspiration, but some have chosen to do so as a preferred alternative to having to pay unpredictable and very expensive usage fees to SoundExchange that become even more unaffordable as listenership grows." (Emert Web IV WDT ¶ 38).⁷

27. Whether or not a significant number of webcasters bump up against the threshold is unimportant because the payment of commercial fees beyond the threshold is entirely unwarranted. Thus, although I have no studies predicting how many NCE webcasters will approach the current threshold during the next five years, I urge the Judges to end this problem, weighing a harm against no benefits whatsoever.

⁷ Likewise, Gene Henes, President of the Board of Praise Network, Inc., testified "I am aware of other noncommercial stations that [have listenerships approaching the ATH cap]. ... Some of these broadcasters have made the unappealing choice of turning listeners away rather than incurring significant costs." (Henes WDT Web IV, ¶ 27.)

IV. NONCOMMERCIAL EDUCATIONAL BROADCASTERS SHOULD ENJOY LOWER-THAN-COMMERCIAL RATES AS THE OUTCOME OF TRANSACTIONS BETWEEN WILLING BUYERS AND WILLING SELLERS.

A. By Prior Rulings of the Judges

28. In Web I, the CARP said this: “[T]he willing buyer/willing seller standard is the *only* standard to be applied. The two factors enumerated in the statute do *not* constitute additional standards or policy considerations.” The Judges ruled in Web II that: “certain ‘noncommercial’ webcasters may constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined . . . for Commercial Webcasters.” (72 Fed. Reg. at 24097). In Web IV they reiterated this point and offered additional justification: “a noncommercial religious broadcaster that streams a simulcast of its broadcasts is prohibited under FCC regulations from selling advertising.” (81 Fed. Reg. at 26319-20).

B. By Revealed Preference

29. In Web II, the Judges noted: “there is a significant history of Noncommercial Webcasters such as NPR and the copyright owners reaching agreement on rates that were substantially lower than the applicable commercial rates over the corresponding period.” (72 Fed. Reg. at 24097). This point was reiterated in Web IV: “Indeed, the NRBNMLC and SoundExchange both proposed that the Judges adopt a different rate structure for noncommercial webcasters than for commercial webcasters, which suggests to the Judges that there is continued support in the marketplace for a different rate structure for commercial and noncommercial webcasters” (81 Fed. Reg. at 26320).

30. I recently have gained access to two newly reached settlement agreements covering NCE statutory webcasting of sound recordings and related ephemeral recordings for 2021-2025 – one between SoundExchange and CBI (NRBNMLC Ex. 20) and the other between SoundExchange and NPR (NRBNMLC Ex. 21). Both settlements provide examples of the types of agreements that noncommercial organizations negotiate. Either could be adjusted to serve as a starting point for developing Web V fee structures for noncommercial educational webcasters.
31. The CBI agreement requires eligible stations to pay fixed annual fees for the ability to stream 159,140 monthly ATH (Joint Motion To Adopt Partial Settlement filed by SoundExchange, Inc. and CBI, Docket No. 19-CRB-0005-WR (Sept. 23, 2019) at 7). These fees rise by \$50 each year thereafter, reaching \$750 in 2025. (*Ibid.*). These fees emerged from willing buyers and sellers, and are, if anything, too high for broader application. For CBI, the avoidance of litigation costs is an element of value separate from and in addition to the value of webcast rights, whereas SoundExchange gains no comparable reduction in litigation costs because rates must still be set for non-settlers. Therefore, the CBI settlement rates are above the upper bound of a reasonable rate for webcast rights.⁸
32. Stations that exceed the monthly ATH limit must pay the default noncommercial rates that will be set by the Judges in Web V. *Ibid.* at 7. However, I have reviewed data from SoundExchange, and it does not appear that any CBI webcaster paid above-minimum

⁸ The argument is similar to the analysis of the Yahoo! agreement in Web I, where CARP, the Librarian, and the Court of Appeals for the DC Circuit agreed that arbitration cost savings realized in agreements resulting in the withdrawal from litigation should be factored into reasonable rate calculations. In that case, the Librarian declined to make this adjustment because of difficulties in quantification and the fact that rates remained in a reasonable range without the adjustment. See Report of the CARP Web I (Interim Public Version) at 67-69; 67 Fed. Reg. 45240 (Librarian Ruling) at 45,255; and *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d939, 952-53(D.C. Cir. 2005).

royalties in the payment data from SoundExchange for 2018 and 2019 that I reviewed. Particularly given that the parties to the agreement did not even know what the Web V noncommercial rates would be at the time they finalized the CBI agreement, I suspect that the consequences of exceeding the monthly cap were not thoroughly explored by either side, so that the settlement's application of noncommercial rates set by the Judges in Web IV for webcasts exceeding the ATH threshold tells us little about the fee consequences that would emerge from negotiations between willing buyers and sellers. It certainly does not support application of commercial fees to noncommercial webcasters that exceed the monthly ATH threshold.

33. The NPR agreement requires NPR to pay SoundExchange an annual lump sum payment of \$800,000 in exchange for increasing amounts of "Music ATH," starting at 360 million in 2021 and increasing to 400 million in 2025. Joint Motion To Adopt Partial Settlement filed by SoundExchange, Inc. and NPR, Docket No. 19-CRB-0005-WR, at 7-8 (Sept. 23, 2019). "Music ATH" is defined as Aggregate Tuning Hours consisting of Website Performances of sound recordings. *Ibid.* at 6. This is a capped flat rate structure with a single payer acting on behalf of all NPR member stations, affiliates, and certain other public radio stations. Individual webcasters are unconstrained in usage provided that Music ATH aggregated across all eligible webcasters remains below the annual caps.
34. If the Judges determine that a lump sum similar to the NPR agreement is a reasonable fee structure for certain NCE webcasters (such as religious broadcasters), the NPR agreement provides a useful starting point for rate setting. The NPR flat rate would need to be adjusted to account for four factors: differences in the capped levels of Music ATH permitted,

differences in the number of covered webcasters, differences in administrative costs, and differences in persistent ability to pay.

35. To adjust for the first factor, multiply the NPR flat fee by the ratio of Music ATH caps:

$$ATH \text{ Adjusted Fee} = \$800,000 * \frac{\text{Annual Music ATH Cap for NRBNMLC}}{\text{Annual Music ATH Cap for NPR}}$$

36. The second adjustment reflects the fact that the NPR settlement agreement covers a maximum number of 530 Originating Public Radio Stations named by CPB annually. *Ibid.* at 8. Public Broadcasters include NPR, American Public Media, Public Radio International, Public Radio Exchange and up to 530 Originating Public Radio Stations named by CPB annually. *Ibid.* at 7. The agreement provides a process for allowing Originating Public Radio Stations that wish to make Website Performances in any calendar year that were not initially named by CPB to participate in the settlement. This process requires CPB to pay an additional fee equal to the annual minimum fee applicable to Noncommercial Webcasters. *Ibid.* at 8.

37. The most natural way to account for differences in the number of webcasters covered by a single payer is to set a single-payer-specific cap on this number. For example, should NRBNMLC elect to serve as a single payer under a new capped flat rate structure the Judges could calculate:

$$\begin{aligned} & \text{Maximum covered \# of NRBNMLC webcasters} \\ &= 530 * \frac{\text{Annual Music ATH Cap for NRBNMLC}}{\text{Annual Music ATH Cap for NPR}} \end{aligned}$$

If NRBNMLC exceeds this cap, the provisions of the NPR agreement (payment of annual minimum fees) would apply.

38. The settlement specifies that the License Fee also includes: “A discount that reflects the administrative convenience to the Collective of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.” *Ibid.* at 8. If the NRBNMLC is required or agrees to provide the same administrative conveniences by making annual lump sum payments, there would be no need to adjust the flat fee further. Otherwise, the value of these administrative conveniences would need to be quantified.
39. The last factor is difficult to quantify, but we can conclude that the adjusted rate is above an upper bound on reasonable rates. This is because stations named by CPB as participants in the NPR agreement have unique access to relatively stable funding through tax dollars allocated as grants by CPB. Indeed, qualification to receive funding from the CPB is a requirement for originating public radio stations to participate in the NPR settlement agreement. *Ibid.* at 6. CPB support is substantial, with \$69.31 million budgeted for direct grants to local public radio stations in FY 2018 (<https://www.cpb.org/aboutcpb/financials/budget/>). With this added (and stable) source of revenue, NPR willingness to pay for royalty rights likely is significantly higher than that of non-NPR NCE webcasters. This suggests that under the willing buyer willing seller standard, other noncommercial webcasters would seek to pay lower rates than those agreed to in the NPR settlement, and the resulting negotiated fee would be lower.

C. By Economic Practice in a Variety of Contexts

40. For-profit firms are often willing to sell their products and services to nonprofit organizations at a substantial discount.⁹ For example, Sand Associates offers one hour of free consulting to any nonprofit that asks.¹⁰ Todoist offers registered nonprofits a 50% discount on its software.¹¹ Google offers nonprofit organizations a comprehensive software package (G Suite for Nonprofits) with Microsoft Office compatible word processing, spreadsheet and slides capabilities as well as communications and on-line storage and many other features for free.¹² Dropbox and LinkedIn offer significant nonprofit discounts, GetResponse offers a 50% discount, and the list goes on.¹³ Indeed, Congress itself has invited such discounts with respect to a service used as an input for noncommercial educational broadcasters themselves – interconnection services. The Public Broadcasting Act of 1967, PL 90-129, expressly authorizes common carriers to provide those services to noncommercial radio broadcasters at “free or reduced rates” 47 U.S.S. § 396(h). The U.S. Senate Commerce Committee explained the provision by noting:

“the bill contains an express provision that nothing in the bill or the Communications Act shall be construed to prevent U.S. common carriers from rendering free or reduced rate communications interconnection services for noncommercial broadcasting. Your committee is confident that the communications common carriers will recognize the great public service potential

⁹ Thus Professor Brynjolfsson’s assertion in his Web II rebuttal testimony is plainly wrong. He asserts that “a discount to small non-commercial entities is not something that willing sellers ordinarily would offer for purely economic reasons. Rather, in a normal free market, agreements with large commercial webcasters would likely set the price and other, potentially competitive, webcasters would pay the same amount or leave the market. I continue to hold the view that it does not make sense from an economic perspective for noncommercial stations to pay less than commercial stations.” Brynjolfsson WRT in Web II at 40. To the contrary, discounts to non-commercial entities are, in fact, common.

¹⁰ <http://nonprofitinformation.com/a-free-offer-nonprofits-shouldnt-refuse/> accessed 9/22/2019,

¹¹ https://todoist.com/nonprofits?lang=en&utm_campaign=todoist_newsletter_2018_01_year_in_review&utm_medium=email&utm_source=sendgrid

¹² <https://www.google.com/nonprofits/offerings/apps-for-nonprofits/>

¹³ <https://fundraising.crowdrise.com/blog/20-nonprofit-discounts-we-think-you-should-know-about>

that noncommercial educational broadcasting has and the importance of interconnection facilities to the system.”¹⁴

41. I have not located systematic studies of for-profit discounting practices, but I know that there are cases where goods and services provided to nonprofit organizations are discounted to cost, leaving no profit margin from these sales.¹⁵ Ignoring for the moment the costs of creating and recording new performances, the cost of extending webcasting rights to NCEs would be close to zero, consisting only of the administrative costs of processing the license. But the Judges have warned against rates that ignore the sunk costs of creating sound recordings.¹⁶ Even so, there is no reason why commercial and NCE webcasters should pay the same amount towards these sunk costs as long as the total paid by webcasters of all sorts is sufficient to cover them.

D. Lower-than-Commercial Royalty Rates Will Not Cannibalize the Commercial Submarket

42. In Web IV, the Judges identified the threat of cannibalization as the reason for applying commercial rates to NCEs for listenership above the ATH threshold.¹⁷ They noted in Web II:

¹⁴ Senate Committee Report for the Public Broadcasting Act of 1967 at 1782. Emphasis added.

¹⁵ I currently chair a capital campaign to build a new community theater for dramatic performances in Westfield Indiana. Our lead donor is making a substantial donation through his family foundation but is also the head of the chief contractor for the project. His firm is discounting to cost, and he is asking subcontractors and materials suppliers to also discount to cost (still being negotiated, but he has at least some successes). G Suite is another example, where similar to performance rights, software is costly to create but there is no cost of sharing it once made and indeed, Google is charging nonprofits nothing for this software.

¹⁶ “[N]ot only are there some initial sunk investments, but there is a requirement of repeated substantial outlays year after year or, in other words, the repeated “sinking” of funds. If sellers are faced with the prospect of not recovering such sunk costs, then the incentive to produce such sound recordings is diminished.” 72 Fed. Reg. at 24094.

¹⁷ “As discussed, *supra* section V.B.1, the Judges apply commercial rates to noncommercial webcasters above the ATH threshold because economic logic dictates that outcome, not because it was observed in benchmark agreements.” 81 FR at 26395. The *supra* reference is to statements made in Web II that “there must be limits to the differential treatment for noncommercial to avoid “the chance that small noncommercial stations will cannibalize the webcasting market more generally and thereby adversely affect the value of the digital performance right in sound recordings.” 81 Fed. Reg. at 26392. In context, it appears that by “cannibalization” the Judges mean “convergence or overlap with the submarket for commercial webcasters and their indistinguishable noncommercial counterparts.” *Ibid*.

“SoundExchange[‘s] ... own economic expert suggests a continuation of differentiated rates where the service offered by such Noncommercial Webcasters does not appear to pose any threat of making serious inroads into the business of those services paying the commercial rate.”¹⁸

43. The sole expert witness that the Judges relied upon for assertions that cannibalization may be a threat appears to be Professor Brynjolfsson, who argued:

“[I]n the event that the CRB elects to set a separate royalty rate for very small noncommercial stations streaming for non-economic reasons, it should make certain that doing so interferes as little as possible with what should be a single market rate for commercial stations and larger noncommercial stations. One sensible approach would be to impose a cap on the amount of streaming that the noncommercial station can do while still paying at a lower rate. From an economic perspective, this reduces the chance that small noncommercial stations will cannibalize the webcasting market more generally and thus affect the fair market value of the digital performance right in sound recordings. A willing seller likely would insist on such a cap if it were, for policy or other reasons, determined to offer a discounted rate to very small noncommercial stations.” (Brynjolfsson WRT in Web II at 42).

44. Professor Brynjolfsson’s statement is wrong in almost every particular. First, there are clear economic reasons for setting a separate royalty rate for NCE webcasters, as discussed throughout my testimony. Second, there is no economic logic behind the assertion that there should be a single market rate. Willing sellers often negotiate different prices with different willing buyers even when there is no product differentiation. Price discrimination is even more common for differentiated products, and NCE webcasters are offering a different set of products to a different audience with different financial and regulatory constraints than commercial webcasters. Willing sellers would not always insist on “caps” or thresholds beyond which commercial rates would apply. The widespread practice of for-profits offering uncapped discounts to nonprofit buyers belies that conclusion. In addition, Professor Brynjolfsson is apparently unaware of the modern literature analyzing corporate social

¹⁸ 72 Fed. Reg. at 24097.

responsibility, corporate/nonprofit partnerships and sponsorships, and corporate donations both theoretically and empirically. This literature shows that for-profits treat nonprofits and social causes generously partly to increase profits, partly because of principal-agent problems within the for-profit firm and in the market for corporate control, and partly through choices of corporate structures and forms that make such generosity sustainable (Kitzmüller and Shimshack, 2012; Steinberg, 2015).

45. Most importantly, the Professor's conclusion that charging NCEs lower rates will erode the fair market value of digital performance rights is generally backwards: Price discrimination based on willingness to pay differences across submarkets will *increase*, not *decrease* the fair market value of the digital performance right in sound recordings. This result is absolutely standard in economics and is even found in some textbooks for the first undergraduate course in microeconomics, although first textbooks demonstrate the result only for monopolies and we will have to go beyond those texts to consider the present application.¹⁹
46. With a single statutory price, record companies receive financial surpluses that support the fair market value of the digital performance right in sound recordings. But this surplus is diminished by the necessity of attracting willing buyers from both the commercial and NCE submarkets when the latter have lower willingness to pay for performance licenses. In contrast, when two statutory prices are set, one for each submarket, the price set for commercial webcasters can be the same as the single price, while the NCEs are charged a

¹⁹ For example, the text I currently use (Krugman and Wells, p. 401) reports: "As long as different groups of customers respond differently to the price, a monopolist will find that it can capture more consumer surplus and increase its profit by charging them different prices."

lower price and hence buy more licenses. When more licenses are sold, the value of digital performance rights increases.²⁰

47. There is a complication that must be considered here. In the previous paragraph, we are treating the commercial and NCE markets as if they were one and the same, as Professor Brynjolfsson mistakenly thinks they are. However, as distinct submarkets, there are separate demand curves for each submarket, and then we need to consider interactions across goods. To the extent that the cross-price elasticity of demand between the two submarkets is large and negative, something like cannibalization can occur. The cross-price elasticity of demand between the commercial and NCE subsectors measures the extent to which a decrease in the price charged to NCEs reduces the quantity of commercial-rate licenses desired for purchase. In turn, the cross-price elasticity of demand is larger when the two submarkets are better substitutes for each other. So, the question of cannibalization reduces to this: if the price charged by NCEs is reduced, will listenership at commercial webcasters fall off to such an extent that there is a significant reduction in the royalties paid under commercial sound recording performance licenses?
48. Before turning to that question, I wish to emphasize that there is no scientific study in the record demonstrating that cannibalization has ever occurred in this market. There is no scientific study in the record that concludes that the cross-price elasticity between commercial and NCE webcast listenership is large and negative. Professor Brynjolfsson's examples all concern NPR stations that are not my primary interest and are different than

²⁰ Were we talking about a price-discriminating monopoly, the surplus generated in support of the value of digital performance rights is definitely higher than that generated by a single price. But under statutory prices, this result is not guaranteed. Sufficient conditions for the conclusion are a) the statutory price for commercial webcasters is the same for a single price or price discrimination, b) the statutory price for NCE webcasters is lower than that for commercial webcasters and c) at the statutory price for NCE webcasters, demand is price elastic, that is, greater than 1 in absolute value.

other NCEs in that they receive some government funding. But in any case, all the examples contain gaps in the chain of logic necessary to establish cannibalization. The asserted relationship is just that, asserted, and normally the CRB requires more thorough justification of assertions that affect the rates and rate structures it sets for statutory cases. Based on the significant differences between NCEs and commercial webcasters, I believe that past Judges appear to have placed too much weight on the unsubstantiated fears of SoundExchange and their witnesses.

49. Although it is possible that the cross-price elasticity between the submarkets is negative (indicating some degree of substitutability among listeners), I don't believe it is very large on *a priori* grounds. Statutory NCE webcasters, particularly those not covered by the negotiated settlements of previous Web rounds (that is, excluding NPR and CBI) are mostly religious in orientation, differing from commercial webcasters in the music they play (hymns, spirituals, Contemporary Christian music), in the mix of talk and music, in the types of listeners desired (listener-donors attracted to the educational and religious mission of the NCE), and in their willingness to promote new niche and noncommercial recordings that bind listener-donors to their cause. These differences are inherent and persistent because the nondistribution constraint removes Nonprofit Board of Directors incentives to seek profits and protects the charitable mission from opportunistic corporate raiders.
50. The examples presented by Professor Brynjolfsson include cases where non-local audiences are sought, but the differences between NCEs and commercial webcasters will persist despite any growth in the geographic scope of listenership. Other examples speak to the use of similar software to attract advertisers (commercial) and underwriters (NCE), but the differences between the subsectors will persist in the face of growing similarity of

technologies employed by the two market segments. Other examples concern high levels of listenership at a few NCE stations, but the differences between the subsectors will persist in the face of growing similarity in listenership numbers. Finally, he points to some surface similarities between commercial advertising and NCE underwriting, but the differences between the subsectors will persist in the face of these surface similarities.

51. The FCC restricts the messages that can accompany underwriting to keep the nature and profitability of such sponsorships distinct from advertising. Underwriting fees, whether paid by for-profits or private foundations, represent donations that can be acknowledged by NCEs but not extended as advertisements. Like other donations, they are limited by free-rider problems and do not grow proportionally with listenership.
52. FCC regulations requiring NCEs to advance and educational program and restricting NCE advertising revenues provide a strong presumption that the two submarkets do not overlap. If rights holders allege at some future time that cannibalization has become a real problem, they should be required to prove their point with clear and convincing evidence in light of this presumption. And if portions of the NCE market become indistinguishable from the commercial market, requiring payment of commercial royalty rates is a blunt hatchet and should be replaced by the scalpel of pruning overlapping programming.
53. In summary, prior Judges have applied commercial rates to noncommercial webcasters whose listenership exceeds an ATH threshold in an effort to eliminate conjectured overlap and convergence and to protect the fair market value of the digital performance right in sound recordings. They have relied on a witness's deeply flawed analysis of economic logic and a handful of inappropriate examples. The sounder economic approach would be to presume that there is no convergence or overlap because of FCC-imposed programmatic and

revenue restrictions and demand scientific evidence be presented before continuing this rate structure.

V. CHARACTERISTICS OF REASONABLE RATE PROPOSALS

A. Flat Fees, or Tiered Flat Fees Should be Employed

54. The statutory rate for noncommercial webcasting has consisted of a flat fee of \$500 for any monthly listenership between 0 and 159,140 ATH, followed by commercial rates for listenership in excess of this threshold for some time now. Tiered flat fees apply one flat fee up to some level of ATH (threshold 1) followed by a different flat fee for usage up to some higher level of ATH (threshold 2), perhaps followed by one or more flat fees applied to one or more higher thresholds. The simplest example of a tiered flat fee would be \$500 for monthly usage between 0 and 159,140 ATH and an additional \$500 for each additional batch of 159,140 ATH or fraction thereof. This means that a webcaster transmitting 300,000 ATH would pay a flat fee of \$1000, and a webcaster transmitting 325,000 ATH would pay \$1500. As a general fee structure, the tiers can continue for arbitrarily high levels of ATH (“tiered flat fees”), or several tiers of flat fees can be followed by a usage rate (“tiered flat fees and rates”), or there can be a limited number of tiers with the highest tier being open-ended (“tiered and capped flat fees,” e.g., \$10,000 for any usage level in excess of the highest threshold).

55. The Judges recognize that the current system of flat fees followed by commercial rates satisfies the willing buyer/willing seller and minimum fee standards specified in legislation because they have chosen this structure. I believe that each of the three tiered structures would also satisfy these standards provided the structure is reasonably simple (willing buyers and sellers would not choose an overly complex approach) and in their basic forms, none of

these tiered approaches are very complex. The bottom tier serves also as a minimum fee, and it is reasonable to suppose that a second tier would emerge in reasonably competitive markets if a larger proportion of NCEs and other noncommercial webcasters crossed the 159,140 ATH threshold.

56. The current structure economizes on transactions costs and simplifies NCE finance because required payments are stable and predictable for those NCEs that do not expect to reach the threshold. Stable and predictable payment obligations are important to NCEs because they can finance them through regular on-air fundraising drives with accurate campaign goals. In contrast, unpredictable payment obligations can lead to irregularly scheduled emergency fundraising drives that alienate listener-donors and impair NCE mission attainment. Tiered flat fees or tiered and capped flat fees economize even more on transactions costs and simplify the fundraising task by extending stable predictability to a broader range of ATH levels. I recommend that the current system be replaced by tiered flat fees or tiered and capped flat fees, requiring payment of a flat fee of \$500 for each 159,140 monthly ATH or fraction thereof.

57. Witnesses have testified in past CRB hearings, and the Judges have agreed, that \$500 is sufficient to cover SoundExchange's administrative costs (for both digital performance and ephemeral recording rights, including the vanishingly small cost of providing the buyer with digital copies for retransmission), and the cost of contributing an appropriate amount towards overall coverage of sunk costs. Administrative costs might conceivably increase with the licensee's listenership, but most of the administrative costs are fixed, so there are substantial economies of listenership scale for each licensee. Thus, if anything, my proposal for tiered flat fees becomes more favorable for sellers as buyers move into higher tiers. However,

fixing that bias makes the proposal too complicated, so the proposal represents a reasonable approximation to what willing buyers and sellers would often agree to in workably competitive markets.

B. If the Judges Reject Tiered Flat Fees Entirely, or if they Select Tiered Flat Fees and Rates, NCE Rates for Usage in Excess of Some Threshold Should be Lower than Commercial Rates.

58. Throughout this testimony, I have argued that NCEs constitute a distinct submarket regardless of listenership, that willingness to pay is lower in this than the commercial submarket, and hence that statutory rates for NCE webcasting should be lower than rates for commercial webcasting. I have quoted prior Judge rulings that appear to agree with these conclusions. The Judges have recognized that commercial rates beyond a threshold is only a proxy included to forestall overlap and convergence, and I have countered that there is no evidence that these things have occurred, and they are unlikely to occur according to economic logic.
59. In this section, I express a fallback position relevant if the Judges accept some, but not all, of my arguments as valid. Should the Judges continue to rule in favor of capped flat fees, I recommend that the rates applied to NCE listenership in excess of the threshold be set to levels significantly below commercial rates. I make the same recommendation if the Judges rule in favor of a tiered and capped rate structure, where usage rates become appropriate when listenership crosses the highest specified threshold.
60. With rare exceptions, NCEs run bare bone operations regardless of listenership because they cannot sell advertising in their broadcasts (and this carries over to their simulcasts, the predominate or exclusive form of webcasting done by NCEs), because the products of underwriters cannot be promoted, because donations are limited due to the free-rider

problem, and because programming decisions are designed to attract the right kinds of listeners and induce the right behaviors and beliefs in those listeners rather than simply to maximize listenership. The incidence of royalty payments lies on the listener-donors and other supporters of the NCE's educational and charitable mission, rather than on shareholders. Thus, NCE willingness to pay for digital sound recording webcast rights is lower than that of commercial webcasters. At the same time, economic theory and data support that for-profit sellers are often willing to offer lower prices to nonprofit buyers. When both seller willingness to accept and buyer willingness to pay are low, any deal struck by willing sellers and willing NCE buyers will likely be struck at lower-than-commercial rates. Market logic allows for this kind of price discrimination; indeed, it insists upon it.

61. How much lower should NCE rates be (for listenership past a threshold)? It is difficult to provide firm numbers here, with few if any appropriate benchmarks from the NCE submarket. However, setting NCE rates (above the threshold) at 1/3 of commercial rates is a reasonable starting point for setting an appropriate ratio. In Web I, the recording industry's trade association offered to set the noncommercial rate at 1/3 the commercial rate with no cap or threshold beyond which commercial rates would apply. This can serve as a high upper bound on the revealed preference (high because the conditions for workable competition were not established). However, because the buyers rejected this proposal, the upper bound on willing buyer/willing seller NCE rates above a threshold might be lower than this.²¹

²¹ In any case, the fact that this deal was offered belies Professor Brynjolfsson's claim that no seller would offer flat fees without a cap.

C. If the Judges Reject Tiered Flat Fees, then Whether an NCE Exceeds Some Threshold Should Be Evaluated on an Annual, Rather than Monthly Basis.

62. Should the Judges rule that usage rates (either commercial or lower) apply to usage in excess of a threshold in order to avoid the overlap and convergence and resulting cannibalization, I recommend that crossing the threshold should be evaluated on an annual rather than monthly basis.
63. Currently, commercial rates apply to additional usage in any month that ATH exceeds 159,140 ATH. It is difficult for me to understand why NCE webcasters who cross the threshold in only a few months pose much of a threat to the value of digital broadcast rights. Brief flicks into supposed “overlap and convergence” evaluated on a monthly basis complicate NCE budgeting and lead to more frequent occurrence of the harmful side effect of restricting listenership, and there is no apparent benefit to offset these costs. In addition, annual evaluation would reduce transaction costs by a small amount (because of fewer checks to write and process, reduced volume of information to enter and store for auditor use, and the like). Hence my recommendation.

D. If the Judges Reject Tiered Flat fees, then the Listenership Threshold for paying Usage Rates Should be Increased.

64. The 159,140 threshold was set long ago based on even older data and designed to address the purported need to keep the commercial and noncommercial markets distinct. The theory seems to be that when NCE listenership becomes sufficiently large, it will have a significant effect on the commercial market. The Judges considered the matter, and in their Web IV ruling left this threshold unchanged. As I understand it, the most important reason for their conclusion was that few noncommercial webcasters reached the 159,140 monthly ATH threshold despite the passage of time. Another reason for their ruling was the finding that the

recent SoundExchange/CBI agreement included the 159,140 ATH threshold, so this threshold was still appropriate.²²

65. I recommend that the Judges reconsider the matter in their final ruling in this case. It is not the growth in NCE webcast listenership, but the growth in commercial listenership and the ratio of their levels that is important for overlap and convergence. Simply put, supposedly converging NCEs are “converging” to a target that is moving away from them and the two need not be converging at all. In addition, it should be noted that none of the buyers in the CBI agreement had listenerships close to the threshold, so it unclear that they gave any consideration to whether this threshold needed to be increased.

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²² “The SoundExchange/ CBI agreement lends support for some elements of SoundExchange’s rate proposal (e.g., a flat \$500 rate for noncommercial webcasters that transmit up to 159,140 ATH), but not for the proposed rate for usage beyond the ATH threshold.” 81 Fed. Reg. 26316 at 26394.

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VII. APPENDIX: WORKS CONSULTED

37 C.F.R. § 380(c), § 381

47 C.F.R. § 73.503

17 USC § 112, § 114

47 USC § 396, § 397, § 399b

Brynjolfsson WRT Web II (Public Version)

Emert WDT Web IV

Henes WDT Web IV

Joint Motion to Adopt Partial Settlement between SoundExchange and CBI Web IV

Katz WRT and WDT Web IV (Public Versions)

NRBNMLC Written Direct Statement Web IV

Rubinfeld WDT Web IV (Public Version)

Shapiro WDT Web IV (Public Version)

Report of the CARP Web I (Interim Public Version)

67 Fed. Reg. 45240 (Librarian Ruling)

72 Fed. Reg. 24084 (CRB Final Order Web II)

79 Fed. Reg. 23102 (CRB Final Order Web III)

81 Fed. Reg. 26316 (CRB Final Order Web IV)

Senate Committee Report for the Public Broadcasting Act of 1967

<http://nonprofitinformation.com/a-free-offer-nonprofits-shouldnt-refuse/>

https://todoist.com/nonprofits?lang=en&utm_campaign=todoist_newsletter_2018_01_year_in_review&utm_medium=email&utm_source=sendgrid

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<https://www.fcc.gov/sites/default/files/public-and-broadcasting.pdf>

<https://www.fcc.gov/media/radio/nature-of-educational-broadcasting>

<https://econweb.ucsd.edu/~vcrawfor/BGTBargainingSlides13.pdf>

Form 990 2017 Life Radio Ministries

Form 990 2018 Praise Network

Additional Works Consulted in Preparing Amended Testimony:

Educational Media Foundation Consolidated Financial Statements with Independent Auditors' Report Dec. 31, 2018 (SOUNDEX_W5_000034531)

Family Stations, Inc. Consolidated Financial Statements Dec. 31, 2017 and Dec. 31, 2016 (SOUNDEX_W5_000034558)

Joint Motion to Adopt Partial Settlement between SoundExchange, Inc. and National Public Radio, *In re* Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Performances (*Web V*), Docket: 19-CRB-0005-WR (2021-2025) (filed Sept. 23, 2019)

Joint Motion to Adopt Partial Settlement between SoundExchange, Inc. and College Broadcasters, Inc., *In re* Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Performances (*Web V*), Docket: 19-CRB-0005-WR (2021-2025) (filed Sept. 23, 2019)

KSBJ Educational Foundation Comparative Financial Data (ECFA.org) (SOUNDEX_W5_000036385)

Radio Training Network Comparative Financial Data (ECFA.org) (SOUNDEX_W5_000036387)

The Christian Broadcasting Network (CBN) Comparative Financial Data (ECFA.org) (SOUNDEX_W5_000036389)

University of Northwestern - St. Paul Comparative Financial Data (ECFA.org) (SOUNDEX_W5_000036392)

Beethoven.com LLC v. Librarian of Congress, 394 F.3d939 (2005)

Restricted Noncomm Stated Liability SOUNDEX_W5_000047347

Noncomm Edu stations SOUNDEX_W5_000070996 (Restricted)

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

**DETERMINATION OF RATES AND
TERMS FOR DIGITAL PERFORMANCE
OF SOUND RECORDINGS AND MAKING
OF EPHEMERAL COPIES TO
FACILITATE PERFORMANCES (*WEB V*)**

**Docket No. 19-CRB-0005-WR
(2021-2025)**

DECLARATION OF RICHARD STEINBERG

I, Richard Steinberg, declare under penalty of perjury that the matters set forth in my Amended Written Direct Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief.

Executed on December 11, 2019.



Richard Steinberg

Curriculum Vitae

Aug. 2019

Richard Steinberg
Department of Economics
Indiana U./Purdue U. at Indianapolis
Indianapolis, In. 46202

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Education

S.B., Economics, MIT, 1977
Honors: Top Debater at MIT, 1976
Ph.D., Economics, University of Pennsylvania, 1984
Honors: University Fellowship, 1977, 1978, Spring 1980
Prelim Fields: Public Finance/Public Economics
Monetary Theory
Dissertation: Two Essays on the Nonprofit Sector, 1983
Robert Inman, Supervisor

Professional Experience

ACADEMIC APPOINTMENTS:

I.U.P.U.I.: Professor, Economics, June 1995 - (assoc., 9/91-6/95)
Philanthropic Studies, Fall 1991 -
Adjunct, School of Public and Environmental Affairs, Fall 1993 - .
Queensland University of Technology (Brisbane, AU), Centre of Philanthropy and
Nonprofit Studies, Myer Foundation Principal Research Fellow, Summer 2003.
Northwestern U.: Visiting Scholar, Ctr. Urb. Affrs. & Policy Rsch., Fall 1991, and
summer 1994
V.P.I. & S.U.: Assistant Professor, Economics, 1982-1988.
Associate Professor (tenured), 1988-1991.
Drexel University: Visiting Lecturer, 1982.

OTHER APPOINTMENTS AND PROFESSIONAL CONSULTANCIES:

Editorial Appointments:

Editorial Board, Voluntaristics Review, 2014 - 2017. Associate Editor, 2017 -
Editorial Board, Giving (Italy), 2007 - 2012.
Editorial Advisory Board, The Nonprofit Review (Japan), 2001 -
Advisory Committee, Encyclopedia of Philanthropy
Editorial Bd., Int'l Journal of Nonprofit and Voluntary Sector Marketing, 1998 -
Associate Editor, Nonprofit Management and Leadership, 1995 - 2000, Advisory
Board, 2000 -
Management Board, Annals of Public and Cooperative Economics, 1994 - 1997;
Editorial Board, 1998 -2019.
Chief Consulting Editor, Research in Progress 1994.
Deputy Editor, Nonprofit and Voluntary Sector Quarterly, 1992-1997; consulting
ed., 1986-92; Member Editorial Board, 2005 -
Associate Editor, Evaluation Review, 1985-1988.
Editorial Board, Abstracts of Working Papers in Economics, 1986-1987.

Expert Witnessing:

3 cases on economic damages (settled).

- 11 cases on state regulation of fundraising (settled).
- 1 case on revocation of tax-exempt status (US Tax Court).
- 1 case on interpretation of "nonprofit" status.
- 1 case of wrongful dismissal for a nonprofit CEO (settled).

Research Consultancies:

- Member, Technical Advisory Council, *Nonprofit Almanac*, 2006
- Member, Advisory Council on Methodology, *Giving USA* (annual), 2001 -.
- Member, Technical Advisory Panel, Charitable Choice Project, 2000 -3.
- Associate Director, IU Center on Philanthropy Panel Study, 2000-.
- Member, Academic Council, National Center on Nonprofit Enterprise, 1999 -.
- Member, Governing Council, Aspen Institute Nonprofit Sector Research Fund, 1997-2003. Public Policy Committee, 2001-2003.
- Member, Advisory Committee for the Institute for the Study of Government and the Nonprofit Sector, Indiana University, 1997-
- Research Consultant, Project on the Growing Commercialism of Nonprofit Organizations (at Northwestern U.), 1994-7.
- Member, Research Committee, Independent Sector, 1993-6.
- Member, Cross-Sector Advisory Group, Going to Scale Project, Rockefeller Foundation (and others), 1994
- Advisory Committee, Project on Innovative Methods of Nonprofit Compensation, 1994-1995.
- Advisor, various I.U. Center on Philanthropy research projects (including Philanthropic Giving Index, Strengthening Nonprofit Management Project, Fundraising and Administrative Cost Study, Discretionary Giving Project) 1992-
- Research Consultant, Program on Non-Profit Organizations, Yale University, 1981-1990.
- Affiliate, Center for Volunteer Development, VPI & SU, 1985.
- Research Fellow, Metropolitan Philanthropy Project, University of Pennsylvania, 1980-1982.

PROFESSIONAL ORGANIZATIONS:

- ARNOVA (Assn. for Research on Nonprofit Organizations and Voluntary Action) 1985 -
- Chair, Search Committee, Executive Director, 2000
- Chair, Prize Committee for Outstanding article published in the *Nonprofit and Voluntary Sector Quarterly*, 1996-1997
- Co-President, 1992-94
- Board Member, 1987-1991
- Chair, Meetings Committee, 1991-2
- Chair, Nominating Committee, 1991.
- Membership Committee, 2006-7.
- Member, Distinguished Achievement Award Committee, 2015.
- Member, RGK prize committee, 2016
- ISTR (International Society for Third-Sector Research), 1993 -
- American Economic Association, 1978 -
- International Institute for Public Finance, 1989 - 1993.

HONORS AND AWARDS:

- Trustees Teaching Award, IUPUI, 2013.
- Nonprofit Times Power and Influence Top 50, 1998.
- Honorable Mention, Staley-Robeson-Ryan-St.Lawrence Prize for Research on Fund

Raising and Philanthropy, 1996.
 Distinguished Faculty Award for Excellence in Teaching, Research, and Service, School
 of Liberal Arts, IUPUI, 1993-94.
 College of Business Teaching Award, VPI & SU, Spring 1987.

Books and Monographs

- (1) *Economics for Nonprofit Managers*. With Dennis R. Young. New York: Foundation Center Press, 1995.
- (2) *Should Nonprofit Organizations Pay Sales and Property Taxes*. With Marc Bilodeau. Washington, DC: National Council of Nonprofit Associations (commissioned monograph, 52 pages).
- (3) *The Economics of Nonprofit Enterprises*. Editor. 28 reprinted articles plus one essay written by me.. Edward Elgar Publishing, Ltd. A volume in the series The International Library of Critical Writings in Economics. 2004 (588 pages).
- (4) *The Nonprofit Sector: A Research Handbook, Second Edition*. Coeditor (with Walter W. Powell). 27 Commissioned chapters. Yale University Press. 2006 (685 pages).
- (5) *Economics for Nonprofit Managers and Social Entrepreneurs*. With Dennis R. Young, Rosemarie Emanuele, and Walter Simmons. Cheltenham, UK and Northampton, USA: Edward Elgar Publishing. April 2019. (435 pages plus 48 page on-line appendix).

Publications in Refereed Journals

- (1) “Abiding by the Law: Using Benford’s Law to Examine Nonprofit Financial Reports.” (accepted subject to minor revision). *Nonprofit and Voluntary Sector Quarterly* (with Heng Qu and Ronelle Burger). Forthcoming.
- (2) “Charitable Giving in Nonprofit Service Associations: Identities, Incentives, and Gender Differences” (with Heng Qu). *Nonprofit and Voluntary Sector Quarterly*, **46(5)**, pp. 984-1005, 2017.
- (3) “Persuasion in Fundraising Letters: An Interdisciplinary Study” (with Ulla Connor, Ed Nagelhout, and Elizabeth Goering). *Nonprofit and Voluntary Sector Quarterly*, **40(2)**, 2011.
- (4) “Ratio Discrimination in Charity Fundraising: The Inappropriate Use of Cost Ratios has Harmful Side-Effects” (with Debra Morris). *Voluntary Sector Review* **1(1)**, 2010, pp. 77-95.
- (5) “The Intergenerational Transmission of Generosity” (with Mark Wilhelm, Eleanor Brown, and Patrick Rooney). *Journal of Public Economics*, **92#10-11**, October 2008, pp. 2145-2156.
- (6) “Strategic Behavior and Learning in Repeated Voluntary-Contribution Experiments,” *Journal of Economic Behavior and Organization*, **67**. September 2008. pp. 782-793 (with Laurent Muller, Martin Sefton, and Lise Vesterlund.

- (7) "Nonprofits with Distributional Objectives: Price Discrimination and Corner Solutions," *Journal of Public Economics*, **89**, December 2005. pp. 2205-2230. (with Burton A. Weisbrod).
- (8) "The Philanthropic Giving Index: A New Indicator of the Climate for Raising Funds," *Nonprofit and Voluntary Sector Quarterly*, **28#4**, December 1999, pp. 491-499. (with Robert T. Grimm Jr. and Kathryn Keirouz).
- (9) "A Comment on Salamon and Anheier's "Social Origins of Civil Society," *Voluntas*, **9#2**, September 1998, pp. 249-260 (with Dennis R. Young).
- (10) "Collective Goods as a Window on Nonprofit Economics," *Third Sector Review*, **4#2**, 1998, pp. 27-48.
- (11) "Further Evidence on the Dynamic Impact of Taxes on Charitable Giving," *National Tax Journal*, **L # 2**, June 1997, pp. 321-334. (with Kevin Barrett and Anya McGuirk).
- (12) "Overall Evaluation of Economic Theories," *Voluntas*, **8/2**, June 1997, pp. 179-204 (invited for symposium issue of refereed journal, not anonymously refereed).
- (13) "Reassessing the Tax-Favored Status of the Charitable Deduction for Gifts of Appreciated Assets," *National Tax Journal*, **XLIX#2**, June 1996, pp. 215-234 (with Cherie J. O'Neil and G. Rodney Thompson).
- (14) "Reward Structures in Public Good Experiments," *Journal of Public Economics*, **61**, 1996, pp. 263-287 (with Martin Sefton).
- (15) "Research Reports: Governmental Policies and the Nonprofit Sector," *Nonprofit Management and Leadership*, **5#1**, Fall 1994, pp. 99-108 (invited note in refereed journal, not anonymously refereed).
- (16) "'The Role of Nonprofit Enterprise' in 1992: Hansmann Revisited," (with Bradford H. Gray), *Nonprofit and Voluntary Sector Quarterly*, **22#4**, Winter 1993, pp. 297-316.
- (17) "Public Policy and the Performance of Nonprofit Organizations: A General Framework," *Nonprofit and Voluntary Sector Quarterly*, **22 #1**, Spring 1993, pp. 13-32.
- (18) "On the Financial Structure of the U.S. Nonprofit Sector," *Voluntas*, **4 (2)**, 1993, pp. 199-204 (invited for symposium issue of refereed journal; not anonymously refereed).
- (19) "Does Government Spending Crowd Out Donations? Interpreting the Evidence," *Annals of Public and Cooperative Economics*, **62#4**, 1991, pp. 591-617.
- (20) "'Unfair' Competition by Nonprofits and Tax Policy," *National Tax Journal*, **44#3**, September 1991, pp. 351-364 (invited, not anonymously refereed).
- (21) "Profits and Incentive Compensation in Nonprofit Firms," *Nonprofit Management and Leadership*, **1(2)**, 1990, pp. 137-152.
- (22) "Taxes and Giving: New Findings," *Voluntas*, **1(2)**, 1990, pp. 1-16.

- (23) "Labor Economics and the Nonprofit Sector: A Literature Review," *Nonprofit and Voluntary Sector Quarterly*, **19(2)**, Summer 1990, pp. 151-170.
- (24) "Economic Perspectives on Regulation of Charitable Solicitation," *Case Western Reserve Law Review*, **39(3)**, 1989, pp. 775-797 (invited, then student refereed).
- (25) "Voluntary Donations and Public Expenditures in a Federalist System," *American Economic Review*, **77(1)**, March 1987, pp.24-36.
- (26) "The Revealed Objective Functions of Nonprofit Firms," *The Rand Journal of Economics*, **17(4)**, Winter 1986, pp.508-526.
- (27) "Charitable Giving as a Mixed Public/Private Good: Implications for Tax Policy," *Public Finance Quarterly*, **14(4)**, October 1986, pp. 415-431.
- (28) "Empirical Relations between Government Spending and Charitable Donations," *Journal of Voluntary Action Research*, **14(2,3)**, Spring/Summer 1985, pp. 54-64.
- (29) "A Comment on Motives Underlying Individual Contributions to Charity," *Atlantic Economic Journal*, **XII(2)**, July 1984, pp. 61-64.

Chapters in Books

- (1) "Nonprofit Organizations and the Macroeconomy" 2018 in Bruce Seaman and Dennis R. Young, eds., *Handbook on the Economics and Finance of Nonprofits*, 2nd edition. (Edward Elgar), pp. 442-460.
- (2) "A Law and Economics Perspective on Nonprofit Organizations." 2018 in Matthew Harding, ed., *Research Handbook on Not-for-Profit Law* (Edward Elgar). pp. 16-47. With Brian Galle.
- (3) "What Should Social Finance Invest In and With Whom?," 2015, in Alex Nicholls, Rob Paton, and Jed Emerson, eds., *Social Finance*. (Oxford University Press), pp. 64-95.
- (4) "If Not for Profit for What? and the Frontiers of Nonprofit Sector Research," 2013 (7 pages). In Dennis R. Young, *If Not For Profit, For What?: A Behavioral Theory of the Nonprofit Sector Based on Entrepreneurship*, Lexington Books, 1983; 30th Anniversary Digital Reissue with new front matter and commentaries by leading scholars Georgia State University Library Digital Archive, 2013. <http://scholarworks.gsu.edu/facbooks2013/1>
- (5) "Overall Evaluation of Economic Theories.", June 2013, in Stephen P. Osborne, ed., *Voluntary and Non-Profit Management*. Thousand Oaks, CA: SAGE Library in Business and Management, SAGE Publications. Reprint of article originally published in *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 8(2):179-204. 1997.
- (6) "Principal-Agent Theory and Nonprofit Accountability," 2010, in Klaus J. Hopt and Thomas Von Hippel, eds., *Comparative Corporate Governance of Non-Profit Organizations*. (Cambridge University Press), pp. 73-125.

- (7) "Non-profit Organizations." *The New Palgrave Dictionary of Economics*, Eds. Steven N. Durlauf and Lawrence E. Blume, Palgrave Macmillan, 2008, *The New Palgrave Dictionary of Economics Online*, Palgrave Macmillan. 16 January 2009, DOI:10.1057/9780230226203.1199. (with Burton A. Weisbrod).
- (8) "Membership Income." In Dennis R. Young, ed., *Financing Nonprofits: Putting Theory Into Practice*. Altamira Press and the National Center for Nonprofit Enterprise, 2006, 121-56
- (9) "Introduction." In Walter W. Powell and Richard Steinberg, eds., *The Nonprofit Sector: A Research Handbook, Second Edition*. Yale University Press, 2006, pp. 1-12. (with Walter W. Powell).
- (10) "Economic Theories of Nonprofit Organizations." In Walter W. Powell and Richard Steinberg, eds., *The Nonprofit Sector: A Research Handbook, Second Edition*. Yale University Press., 2006, pp. 117-139.
- (11) "Donative Nonprofit Organizations," *Handbook on the Economics of Giving, Reciprocity, and Altruism, Vol. 2*, a volume in the *Handbooks in Economics* series edited by S.-C. Kolm, and J. Mercier-Ythier. Elsevier/North-Holland, 2006 , pp. 1271-1333 (with Marc Bilodeau).
- (12) "Chapter 7: The Economics of Philanthropy: Do We Give Until it Hurts, or Does it Hurt Until We Give?" in Joseph Stoltzman and Laurel Singleton, eds., *Civic Ideals and the Giving Society*. Council of Michigan Foundations, 2005. (with Robert Harris).
- (13) "Religious and Secular Giving, by Race and Ethnicity." *Exploring Black Philanthropy: New Directions for Philanthropic Fundraising* (Vol. 48:57-66 in *New Directions for Philanthropic Fundraising, a Quarterly Sourcebook*, edited by Patrick Rooney and Lois Sherman). 2005. Wiley Periodicals. (with Mark Wilhelm).
- (14) "Tracking Giving Across Generations." In Dwight Burlingame, ed., *Philanthropy Across the Generations*, vol. 42 in *New Directions for Philanthropic Fundraising, a Quarterly Sourcebook*, 2004. Jossey-Bass, Inc. pp. 71-82. (with Mark Wilhelm).
- (15) "Economic Theories of Nonprofits," In Dwight Burlingame, ed., *Philanthropy in the U.S.: An Encyclopedia*. ABC-CLIO, 2004. Vol. 1, pp. 128-132.
- (16) "Introduction," in Richard Steinberg, ed., *The Economics of Nonprofit Enterprises*, Edward Elgar, 2004, xiii-xxx.
- (17) "Economic Theories of Nonprofit Organizations: An Evaluation," in Helmut Anheier and Avner Ben-Ner, eds., *The Study of the Nonprofit Enterprise: Theories and Approaches*. New York: Kluwer/Plenum, 2003, pp. 277-310. (Expanded and updated version of "Overall Evaluation of Economic Theories," published in *Voluntas*, 8/2)

Also reprinted in John B. Davis and Asimina Christoforou, eds., *The Economics of Social Institutions*. Northampton, MA: Edward Elgar Publishing Ltd., 2013.
- (18) "Pricing and Rationing by Nonprofit Organizations with Distributional Objectives," (with Burton A. Weisbrod), in Burton A. Weisbrod, ed., *To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector*. New York: Cambridge University Press, 1998, pp. 65-82.

- (19) "The Theory of the Nonprofit Sector in Housing," in C.T. Koebel, ed., *Shelter and Society: Theory, Research, and Policy for Nonprofit Housing*. Albany: SUNY Press, 1998, pp. 21-38.
- (20) "Public-Private Partnerships for Affordable Housing: Definitions and Applications in an International Perspective" in C.T. Koebel, ed., *Shelter and Society: Theory, Research, and Policy for Nonprofit Housing*. Albany: SUNY Press, 1998, pp. 39-70 (with C. Theodore Koebel and Robert Dyck).
- (21) "Competition in Contracted Markets," in Perri 6 and Jeremy Kendall, eds., *The Contract Culture in Public Services*. Hampshire (England): Ashgate, 1997, pp. 161-180.
- (22) "On the Regulation of Fundraising," in Dwight Burlingame, ed., *Critical Issues in Fundraising*. New York: John Wiley and Sons, 1997, pp. 234-246.
- (23) "Can Individual Donations Replace Cutbacks in Federal Social-Welfare Spending?" in Dwight Burlingame, William Diaz, Warren Ilchman, and Associates, *Capacity for Change? The Nonprofit World in the Age of Devolution*, Indiana University Center on Philanthropy, 1996, pp. 57-80
- (24) "Philanthropy and Economic Development," in Richard F. America, ed., *Philanthropy and Economic Development*. Greenwood Publishing Group, Inc., 1995.
- (25) "Profits and Incentive Compensation in Nonprofit Firms" (reprint of article appearing in *Nonprofit Management and Leadership*), in Sharon Oster, ed., *Nonprofit Management, a volume in The International Library of Management*. Dartmouth Publishing Company, 1994, pp. 329-344.
- (26) "Does Government Spending Crowd Out Donations? Interpreting the Evidence" (reprint of article appearing in *Annals of Public and Cooperative Economics*), in Avner Ben-Ner and Benedetto Gui, eds., *The Nonprofit Sector in the Mixed Economy*. University of Michigan Press, 1993, pp. 199-226.
- (27) "Economics and Philanthropy: A Marriage of Necessity for Nonprofit Organizations," in *Fund Raising Economics*, a quarterly sourcebook in the series on Philanthropic Fund Raising, Jim Greenfield and Robert Fogel, eds. Jossey-Bass, Inc., 1994, pp. 7-26.
- (28) "How Should Antitrust Laws Apply to Nonprofit Organizations?," in Dennis R. Young, Robert M. Hollister, Virginia A. Hodgkinson, and Associates, eds., *Governing, Leading, and Managing Nonprofit Organizations*, Jossey-Bass, Inc., 1993, pp. 279-305. Earlier version published as "Antitrust Policy: Are Nonprofits Different?" in *Leadership and Management* (conference volume, Independent Sector), 1991, pp. 645-658.
- (29) "Competition, Performance, and Public Policy Towards Nonprofits," (with Catherine Eckel), in David Hammack and Dennis Young, eds., *Nonprofit Organizations in the Marketplace*, Jossey-Bass, Inc., 1993, pp. 57-81.
- (30) "The Market for Drug Treatment," in Dean R. Gerstein and Henrick J. Harwood, eds., *Treating Drug Problems. Vol. 2: Commissioned Papers on Historical, Institutional, and Economic Contexts of Drug Treatment*. Washington D.C.: National Academy Press, 1992, pp. 245-288.

- (31) “Nonprofit Organizations,” “Social Welfare Functions,” and “Environmental Economics,” all in Frank N. Magill, ed., *Magill's Survey of Social Science: Economics*, 1991, pp. 1617-1623; 2122-2128; and 700-706, respectively.
- (32) “The Economics of Fundraising,” in Dwight Burlingame and Monty Hulse, eds., *Taking Fund Raising Seriously*, Jossey-Bass, Inc., 1991, pp. 239-256.
- (33) “Donations, Local Government Spending, and the ‘New Federalism’,” in Richard Magat, ed., *Philanthropic Giving*, Oxford University Press, 1989, pp. 143-156.
- (34) “Nonprofit Organizations and the Market,” in Walter Powell, ed., *The Nonprofit Sector: A Research Handbook*, Yale University Press, 1987, pp.118-138.
- (35) “Should Donors Care about Fundraising?” in Susan Rose-Ackerman, ed., *The Economics of Nonprofit Institutions: Studies in Structure and Policy*, Oxford University Press, 1986, pp. 347-366.

Other Publications

- (1) Richard Steinberg. (2015). “Ask the Experts” (sidebar, one of several experts answering six questions about philanthropy and nonprofits) in “2015’s Most and Least Charitable States” by Richie Bernardo. Report commissioned by Wallethub and posted at <https://wallethub.com/edu/most-and-least-charitable-states/8555/#>.
- (2) Richard Steinberg. (2015). “In Memoriam: Estelle James.” *Inside ISTR* 23#4: 11-2. (Newsletter for the International Society for Third-Sector Research).
- (3) Duffy, Barbara, Richard Steinberg, Ruth Hansen, and Yuan Tian. (2014). “Wattsamatta wit U, or, U Really Got a Hold on Me.” ISTR Conference Working Paper Series, Volume IX -- Muenster, Germany -- July 2014. (33 pages, available online at https://c.ymcdn.com/sites/istr.site-ym.com/resource/resmgr/WP2014/U_Shape_DSHT_070714.pdf) Note: Competitively selected.
- (4) Invited Op Ed in the New York Times “Room for Debate” series (where several authors are invited to comment on the same issue). On the topic “Tax Break for Sports: Should pro sports leagues enjoy nonprofit status?,” my piece was titled “Nonprofit Teams Rather than Leagues.” *NYT*, Sept. 4, 2014 available at <http://www.nytimes.com/roomfordebate/2014/09/03/should-pro-sport-leagues-get-tax-breaks/nonprofit-teams-rather-than-leagues>
- (5) Invited Essay: “Rethinking Tax Incentives Could Inspire Greater Giving.” *The Chronicle of Philanthropy*. September 28, 2011.
- (6) Expert Witness Report: “Fundraising by la Société pour la Prévention de la Cruauté Envers les Animaux (Canadienne)/the Canadian Society for the Prevention of Cruelty to Animals during Pierre Barnoti's Tenure as CEO.” June 28, 2011. (48 pages)
- (7) Consulting Report: “Expert Opinion on Fundraising by SPCA International.” 29 pages. Nov. 12, 2010. Available from the author.
- (8) Consulting Report: “The Lifetime Value of Donors to DVNF.” Available from the author and posted on the client's web site:

http://www.dvnf.org/images/stories/lifetime_value.dvnf.9.10.10.pdf (13 pages)
September 10, 2010.

- (9) Consulting Report: "Expert Opinion on Fundraising by the Disabled Veterans National Foundation." Available from the author and posted on the client's website:
<http://www.dvnf.org/images/stories/ProfOpinion.pdf>. March 21, 2010. 7 pages (with executive summary).
- (10) "Caveat Donator," Editorial, *International Journal of Nonprofit and Voluntary Sector Marketing*, 9#2, pp. 101-104. May 2004.
- (11) "Tax Credit Only Benefits Poverty Relief," *The Register*, April 1998.
- (12) "Quantifying Activity: Board planning by the Numbers" (review of Handy's 'Reputation as Collateral: An Economic Analysis of the Role of Trustees of Nonprofits,') *The Nonprofit Times*, March 1997, pp. 50-51.
- (13) "Comment on William Bogart's 'Accountability and Nonprofit Organizations: An Economic Perspective,'" *Nonprofit Management and Leadership*, 7#2, Winter 1996, pp. 225-228. (Commissioned commentary, appearing in a refereed journal but not refereed).
- (14) "Would a Flat Tax Flatten Donations," *Indiana Donors Alliance Review*, 2#1, Spring 1996.
- (15) "What the Numbers Say [about the impact of government tax and spending changes on donations]," *Advancing Philanthropy*, 3#2, Summer 1995, pp. 26-31.
- (16) "United Cancer Council v. Commissioner of the IRS." in *Philanthropy Matters*, Summer 1993, pp. 13-15.
- (17) "Morality and Diversity - A Comment on Lipman ('The Morality of Philanthropy')," *Society*, September/October 1990, pp. 12-14.
- (18) "Regulating the Competition between the Nonprofit and For-Profit Sectors," *Hearings on Nonprofit Competition*, Small Business Committee, U.S. House of Representatives, June 1988. Testimony, pp. 31-34. Prepared Statement, pp. 165-178.
- (19) "Optimal Contracts Need not be Contingent: The Case of Nonprofit Firms," in Drew Hyman and Kurt Parkum, eds., *Models of Health and Human Services in the Nonprofit Sector*, (conference volume, Association of Voluntary Action Scholars), Oct.1986, pp. 87-102.
- (20) "Health Care Revisited," (letter to editor in response to Herzlinger and Krasker's "Who Profits from Nonprofits," printed with rebuttal from authors), *Harvard Business Review*, 65(5), September/October 1987, pp. 159-164.
- (21) "Optimal Fundraising by Nonprofit Firms," *Giving and Volunteering: New Frontiers of Knowledge*, (conference volume, Independent Sector and United Way of America), 1985, pp. 411-446.
- (22) "Tax Reform and Charitable Donations - Problems and Opportunities," VPI W.P. #E85-03-02, March 1985 (placed on *Tax Notes* on-line and microfiche database and on Lexis on-line database), 29 pages.

- (23) "Philanthropy in a Regional Context - Results of the Metropolitan Philadelphia Philanthropy Study," *National Society of Fund-Raising Executives Journal*, Fall 1981, pp.18-20 (with Thomas Reiner and Julian Wolpert).

Invited Book Reviews

- (1) *Who Benefits from the Nonprofit Sector*, Charles Clotfelter, ed., in *Journal of Economic Literature*, June 1993, pp. 915-917.
- (2) *The Nonprofit Sector in International Perspective*, Estelle James, ed., in *Journal of Economic Literature*, March 1991, pp. 120-121.
- (3) *Sources of Charity Finance*, Norman Lee, ed., in *Voluntas*, **1(2)**, 1990.
- (4) *The Nonprofit Economy* by Burton Weisbrod, *Educating Managers of Nonprofit Organizations* by Michael O'Neill and Dennis Young, and *Strategic Planning for Public and Nonprofit Organizations* by John Bryson, appearing in *Journal of Policy Analysis and Management*, **8(4)**, 1989.
- (5) *Dimensions of the Independent Sector: A Statistical Profile, 2nd ed.*, by Virginia Hodgkinson and Murray Weitzman, appearing in *Journal of Voluntary Action Research*, **16(3)**, 1987.
- (6) *The Economics of Nuclear Energy* by L.G.Brooks and H. Motamen, appearing in *Government and Policy (Environment and Planning C)*, **4(1)**, 1986.

Unpublished Papers

- (1) "Recasting Three-Failures Theory." 2018. Presented at the 2018 ARNOVA Annual Conference, Austin, Texas (16 slides).
- (2) "Abiding by the Law: Using Benford's Law to Examine the Quality of Nonprofit Financial Reporting." 2019. With Heng Qu and Ronelle Burger. (typescript 40 pages).
- (3) Duffy, Barbara, Richard Steinberg, and Yuan Tian. (2015). "Income, Wealth, and Generosity in the U.S. Philanthropy Panel Study." (typescript 41 pages).
- (4) Duffy, Barbara, Ruth Hansen, Russell James, Richard Steinberg, and Yuan Tian. 2014. "Zombie Philanthropy." Paper presented at the 2014 ARNOVA annual conference, Denver, Colorado. (18 slides).
- (5) "Competition and "Other Community Benefits" provided by Nonprofit Hospitals: Beyond Uncompensated Care." (with Alvin Lyons). First Draft, 2013 Second draft, 2014 (20 pages)
- (6) "Towards Integrated Models of Nonprofit Organizations: Genesis and Objectives." First draft, Nov. 2009, revised Oct. 2011. typescript 14 pages.
- (7) "Earned, Owned, or Transferred: Are Donations Sensitive to the Composition of Income and Wealth? Working Paper, IUPUI Dept. of Economics. (with Eleanor Brown, Patrick Rooney, and Ye Zhang). Latest draft January 2014 (typescript 44 pages).

- (8) "Does Disaster-Related Giving Come at the Expense of Giving to Other Causes?" First draft Nov. 2006. typescript, 17 pages.
- (9) "Differences in Giving and Volunteering in the U.S. by Race and Ethnicity" (with Mark Wilhelm). First draft August 2004. typescript, 40 pages.
- (10) "The Many Fields of Philanthropic Studies," Draft, October 2004. Typescript 8 pages.
- (11) "Patterns of Giving in COPPS 2001." (with Mark Wilhelm). Draft, Nov. 2003. Typescript 38 pages.
- (12) "Giving: The Next Generation – Parental Effects on Donations" (with Mark Wilhelm). Draft, June 2003. Circulating as Working Paper No. CPNS21. Brisbane, AU: Centre of Philanthropy and Nonprofit Studies, Queensland University of Technology, Aug. 2003. Typescript 33 pages.
- (13) "Ransom of the Opera," November 1997 (with Marc Bilodeau).
- (14) "The Clash of Values in the Civil Society," Aug. 1995. Revision invited by Voluntas.
- (15) "Soliciting the Warm Glow: An Economic Model of Fundraising," (with Al Slivinski), Oct. 1996.
- (16) "A Deeper Look at the Tax Preferences Given Nonprofit Organizations," (with Catherine Eckel), March 1995.
- (17) "Nonprofit Sources of Earned Income," November 1994 (revised 1996 for publication as an Aspen Institute Nonprofit Research Fund Working Paper).
- (18) "Tax Policy and the Objectives of Nonprofit Organizations in a Mixed-Sector Duopoly," (with Catherine Eckel), (revised March 1994).
- (19) "United Cancer Council v. Commissioner of the IRS and the Indirect Regulation of Fundraising," April 1993.
- (20) "Cooperation Meets Collusion: Antitrust and the Nonprofit Sector," (with Catherine Eckel), October 1991.
- (21) "The Minimum Wage and Volunteering," (with William T. Smith II), September 1989 (revised February 1990), 26 pages.
- (22) "The Effect of Federal Government Expenditure Cutbacks on Service Provision by States and Nonprofit Organizations," (with Jerald Schiff), November 1988, 30 pages.
- (23) "Fairness and Efficiency in the Competition Between For-Profit and Nonprofit Firms," Program on Nonprofit Organizations, Yale University (PONPO) Working Paper no. 132, June 1988, 20 pages.
- (24) "Tax Credits for Charitable Giving," February 1988, 12 pages.
- (25) "Joint Crowdout: An Empirical Study of the Effects of Federal Grants on State Government Expenditures and Charitable Donations," (with Lawrence Lindsey), National Bureau of

Economic Research Working Paper No. 3226, January 1990, 34 pages. Earlier version available as Duke Center for the Study of Philanthropy and Voluntarism Working Paper, January 1988.

- (26) "On the Uniqueness of Equilibrium in Models of Voluntary Provision of Public Goods," (revised and retitled, Jan 1988), 12 pages.
- (27) "Economic and Empiric Analysis of Fundraising Behavior by Nonprofit Firms," PONPO W.P. #76, Sept. 1983, 39 pages.
- (28) "A Study of Foundation Behavior and a Proposal for Regulatory Reform," (with Scott Perlman), Metropolitan Philanthropy Project W.P. # 12, July 1982, 35 pages.
- (29) "Effects of Air Pollution on Overall Mortality Rates," S.B. dissertation in Economics, MIT, 1977.

Other Work in Progress

- (1) "Tax Policy Toward Intersectoral Competition with Endogenous Objectives."
- (2) "Methods for Strategic Management of Fundraising Campaigns."
- (3) "Matching Charity and Corporate Perks: The Theory of Corporate Matching of Employee Gifts"
- (4) "Predicting Success in Nonprofit or Philanthropic Studies Graduate Programs"

Service

Service to the professional discipline

- (1) Referee, *American Economic Review*, *Quarterly Journal of Economics*, *Journal of Political Economy*, *American Journal of Sociology*, *Rand Journal of Economics*, *Journal of Public Economics*, *National Tax Journal*, *Public Choice*, *Public Finance Quarterly*, *Public Finance Review*, *Journal of Policy Analysis and Management*, *International Economic Review*, *Journal of Economic Behavior and Organization*, *Annals of Public and Cooperative Economics*, *Economic Inquiry*, *Nonprofit and Voluntary Sector Quarterly*, *Nonprofit Management and Leadership*, *Voluntas*, *International Review of Economics and Finance*, *Journal of Health Politics, Policy, and Law*, *Journal of Cultural Economics*, *Journal of Comparative Economics*, *Contemporary Economic Issues*, *Southern Economic Journal*, *Contemporary Economic Policy*, *International Journal of Nonprofit and Voluntary Sector Marketing*, *Journal of Economic Education*, *Public Management Review*, *Administration and Society*, *Journal of Business Research*, *American Review of Public Administration*, *Oxford Economic Papers*, *Journal of Law, Economics, and Organization*, *International Journal of Industrial Organization*, *Journal of Civil Society*, *Review of Industrial Organization*, *Policy Studies Journal*, *Journal of Public Economic Theory*, *BE Journal of Economic Analysis and Policy*, *Economics of Governance*, *Review of Economics of the Household*, *European Journal of Comparative Economics*, *Journal of Institutional and Theoretical Economics*, *Nonprofit Policy Forum*, *Journal of Behavioral and Experimental Economics*, *Journal of Economic Studies*, *Production and Operations Management*, *Journal of Social Policy*, *Public*

Administration Review, Journal of Public and Nonprofit Affairs.

- (2) Reviewed grant proposals to the National Science Foundation, Social Sciences and Humanities Research Council of Canada, European Research Council, The Research Foundation Flanders, Netherlands Organisation for Scientific Research, Virginia Water Resources Research Center, I.U. Center on Philanthropy Research Funds, and the Aspen Institute Nonprofit Sector Research Fund. Reviewed manuscript proposals submitted to Jossey-Bass Inc., Routledge, Edward Elgar Co., Springer, Oxford University Press, and Johns Hopkins University Press. Reviewed curriculum development and research grant proposals submitted to IU Center on Philanthropy.
- (3) Faculty advisor, I.U. Doctoral Fellows Program in Philanthropy, 1991-1993 and successor program organized by the Aspen Institute's Nonprofit Research Fund, 1994 - 2005. (Worked with approximately 72 doctoral candidates in various disciplines from various Universities to refine their dissertations and become socialized and expert in the broader interdisciplinary research community on philanthropy and nonprofit organizations. Faculty Advisor, Social Science Research Council Program on Philanthropy and the Nonprofit Sector, 2001, 2003. Faculty, ARNOVA doctoral fellows, 2008.
- (4) ARNOVA Co-President: The chief accomplishments during our co-Presidency (for which I can claim varying degrees of personal credit) include the growth in the organization (from about 230 to over 430 dues-paying members; in the two years since the end of our office the number of members grew to exceed 700 and is now about 1200), establishment of four annual awards for the profession (for best manuscript, dissertation, article in NVSQ, and life-time contribution to the field), growth in the annual research conference (from around 50 papers and 90 attendees to over 200 papers and 300 attendees, now over 600 attendees), development and implementation of a strategic five-year plan, relocation of the executive office to the Indiana University Center on Philanthropy for the next five years (with a substantial cash and in-kind investment by the Center), affiliation of our refereed journal, Nonprofit and Voluntary Sector Quarterly with the Program on Nonprofit Organizations at Yale University for the next three years (with a substantial cash and in-kind investment by Yale), co-sponsorship and editorial role in the annual publication Research in Progress, and the establishment of a strategic development fund. As President, I served ex-officio on all committees (membership development and services, resource development, publications, meetings, awards, and nominations), conducted board and executive committee meetings, wrote various columns for the newsletter, selected committee members, and had primary responsibility for the annual conferences and publications (my co-President had primary responsibility for the awards, strategic plan, and attempts to secure outside funding, although we collaborated on all these efforts). Three grants written by us (with assistance from many others) during our reign were funded shortly after our term ended: \$206,000 over 3 years by the W.T.Kellogg Foundation, \$100,000 over 3 years by an anonymous donor, and \$50,000 over 3 years by the Ford Foundation. These allowed ARNOVA to hire a full-time executive director and office manager and a half-time managing editor, as well as largely endowing funds for annual awards and travel assistance for emerging scholars.
- (5) Assisted in collaboration between IU and the University of Ljubljana, Slovenia, for the development of a masters degree program in nonprofit management for the emerging societies in Central and Eastern Europe. Assisted in collaboration between IU School of Social Work, IU Center on Philanthropy, and various Polish Universities to develop MSW in nonprofit management degree programs.

- (6) Program Committee member, 1995 Independent Sector Spring Research Forum on Public Policy Issues.
- (7) Faculty, Executive Leadership Institute of the National Society of Fund Raising Executives, 1994-.
- (8) Co-founder and organizer, Workshop in Nonprofit Economics (periodic meeting), 1994-.

University committee service at departmental level:

Economics department, IUPUI:

- (1) Coordinator for E201 (Principles of Microeconomics), Fall 1994-Summer 1995; Fall 2008-Summer 2009.
- (2) Primary Committee, 1992- .
- (3) Search and Screen Committee, 1992- (Chair, AY 95-96 and 97-98 searches).
- (4) Admissions Committee, Ph.D. in Economics, 2010-2013
- (5) Graduate Programs Committee, 2015-
- (6) Master's Thesis Committees:

Chun Zi Zhang, "How Does Government Funding Affect Private Donations to Research Universities?" (M.A., Economics, 2000). (Chair).

Timothy Brooks, "Does the Charitable Property Tax Exemption Pay for Itself? A Cost-Benefit Analysis of the Indiana Property Tax Exemption for Nonprofits." (M.A., Economics, 2004). (Chair).

- (7) Doctoral Thesis Committees:

Jon Bergdoll (Ph.D., Economics, In progress, likely Chair).

- (8) Course Development. Designed and submitted for approval (granted) Econ E 516 "Institutional Setting for Nonprofit/Philanthropic Economics"

Philanthropic Studies department, IUPUI:

- (1) Chair of the Faculty in Philanthropic Studies, 1997-99.
- (2) Voting member, ex officio, Center on Philanthropy Board of Governors, 1997-99.
- (3) Member, Executive Committee of the Faculty, 1994-2001.
- (4) Director of Graduate Studies and Chair, Faculty Advisory Committee, M.A. degree in Philanthropic Studies, 1992-2000 (Participated in a retreat for faculty teaching core courses in this new program. Reviewed applications for admission and aid. Planned and participated in orientation program. Wrote advisor's and thesis handbooks).

- (5) Member, Ph.D. Committee (Review policies, standards, admissions). Merged into Academic Programs Committee, 2009-, where I continue to serve.
- (6) Founding Chair, Committee on Faculty Incentives in Cross-Disciplinary Programs, 2003 – 2006. Reconstituted as Faculty Structure and Reorganization Committee, (I served as Chair), 2009-2010.
- (7) Chair, Faculty Development Committee, 2003 – 2006.
- (8) Founding chair, Seminar Series on Nonprofit Organizations, 1992-1994. Workshop In Multidisciplinary Philanthropic Studies, 2006 – 2016 (co-Chair starting in 2009). (Renamed “Philanthropy Research Workshop,”) 2016 – 2019.
- (9) Member: Research Committee, 1997-2001, 2012 – .
 Strategic Planning Committee, 1997-2000.
 Academic Advisory Committee (inter-campus), 1992-1993. Reconstituted as the Executive Committee of the Philanthropic Studies Faculty Association, 1994-2010. (Reviewed curriculum development grant proposals, assessed cross-listing of courses with philanthropic studies, discussed new degree, minor, and certificate programs, attended faculty retreats, developed new core curriculum).
 Budgetary Affairs Committee, 2010 - 2013
 Academic Programs Committee, 2011- .
 Science of Philanthropy Institute Conference planning Committee (conference jointly sponsored by the Lilly Family School of Philanthropy and the University of Chicago), 2017 - .
- (10) Search Committees: Advisory Committee for Director, IU Center on Philanthropy, 1992/3.
 Associate Director, The Fundraising School, 1993-94.
 Director of Development and Communication, 1998.
 Director of Graduate Studies, 2011
 Managing Editor, Giving USA, and research department, 2011.
 Asst. or Assoc. Professor, Behavior and Motivations for Giving and Volunteering, 2012-3
- (11) Advisory role for development of executive education format degree programs in Philanthropic Studies and in Nonprofit Management. Advisor and/or participant, research and conference initiatives of the IU Center on Philanthropy (Strengthening the Nonprofit Sector Project; Discretionary Income/Giving Potential Project; Joint research with American Association of Fund Raising Counsel; Program Committee for 1995 Taking Fund Raising Seriously Conference; Participant, Next Steps conference).
- (12) Thesis Committees:

Varden E. Hadfield, “Performance-Based Compensation in Nonprofit Organizations: Major Donor Attitudes.” (M.A., Philanthropic Studies, 1999) (Chair)

Al Lyons, “Determining Benchmarks for Evaluating Hospital Fund Development Programs.” (M.A., Philanthropic Studies, 2003).

Al Lyons, “The Philanthropic Behavior of Nonprofit Organizations: An Analysis of Indiana Hospitals.” (Ph.D., Philanthropic Studies, 2009) (Chair)

Danielle Vance, “Discontinuance of Government Funding and Nonprofit Failure.” (M.A.,

Philanthropic Studies, 2010).

Janice O'Rourke, "Milk Bank Donor Recruitment: Does Positive Framing Affect Success." (Not completed) (Ph.D, Philanthropic Studies) (Chair).

Sung-Ju Kim, "The Joint Crowdout of Donations to People in Need." (Ph.D, Social Work with doctoral minor in PHST, 2012).

Heng Qu, "Essays on Nonprofit Finance." (Ph.D., Philanthropic Studies, 2016) (Chair).

Ji Ma, "Networked Civil Society: Three Essays on the Government-Nonprofit Relationship in China." (Ph.D., Philanthropic Studies, 2018)(Chair).

- (13) Course Development. Designed and submitted for approval PHST P665: Nonprofits and Philanthropy in Society II (approved).

Designed, in collaboration with Lehn Benjamin, a Bootcamp providing 24 hours of contact time for entering PhD students and cotaught it every year 2015 – .

SPEA, IUPUI:

- (1) Faculty Advisory Committee, MPA with Concentration in Nonprofit Management, 1992- (assessed implementation, evaluation, and marketing issues; conducted third-year program review and recommended curricular reforms).

- (2) Thesis Committees:

Jamie Levy, "A Framework for Studying the Dynamics of Individual Acculturation in Nonprofit Mergers." (M.P.A. with Concentration in Nonprofit Management, 2000) (Chair)

- (3) Search and Screen Committee. For an economist at the Asst. or Assoc. Prof. level, 2003.

Department of Economics, VPI&SU:

- (1) Director of Undergraduate Studies in Economics, 1987-1991 (Reviewed course offerings, requirements, policies, and listings; chief advisor (coordinated and trained other advisors); peer-reviewed and advised all graduate students in their teaching activities; designed and conducted exit interviews for graduating seniors; developed and implemented an annual forum where economics alumni spoke to prospective majors; faculty rep., Economics Club; marketed courses and recruited majors; coordinated honors program; co-op coordinator; nominated students for awards; coordinated departmental graduation ceremony).

- (2) Working Paper Coordinator, 1983-1986.

- (3) Served on the following Dissertation Committees:

Jerome Savitsky (Ph.D., Economics, VPI&SU) (Chair), "A Theoretical Analysis of the Labor Market Wage and Employment Effects of Title VII of the Civil Rights Act of 1964."

Richard Milam (Ph.D, Economics, VPI&SU), "The Effects of Trade Barriers in an Imperfectly Competitive Market."

- Bipasa Datta (Ph.D., Economics, VPI&SU), "Essays on Credit Rationing and Borrowing Constraints."
- Kevin Barrett (Ph.D., Accounting, VPI&SU) (Co-chair), "Charitable Giving and Federal Income Tax Policy: Additional Evidence Based on Panel-Data Elasticity Estimates." (Winner of American Tax Association and ARNOVA Awards for Best Dissertation).
- Edward Zajicek (Ph.D., Economics, VPI&SU), "Valuation of Quality Determinants in Consumer Demand for Automobiles: A Hedonic Price Approach."
- Patricia Smith (Ph.D., Economics, VPI&SU), "Interstate Variations in AFDC Benefits: A Game Theoretic Approach."
- Randy Beach (Ph.D., Economics, VPI&SU), "Net Social Security Taxes and Life-Cycle Decisions."
- Partha Sengupta (Ph.D., Economics, VPI&SU), "Essays on the Theory of Tax Evasion."
- Jeong Kim (Ph.D., Economics, VPI&SU), "A Public Durable Good/Bad Theory in an Overlapping Generations Economy."
- Cheng-Chen Yang (Ph.D., Economics, VPI&SU), "Essays on Optimal Taxation and Pricing."
- Gail Heyne-Hafer (Ph.D., Economics, VPI&SU), "Customer-Class Pricing and Stock Price for Regulated Utilities."
- Kent Poff (Ph.D., Accounting, VPI&SU), "An Analysis of Uniform Capitalization of Inventory Costs."
- Manolis Tsiritakis (Ph.D., Economics, VPI&SU), "The Cost of Interprovincial Restrictions on Sales of Beer in Canada."

University committee service at school level:

School of Liberal Arts, IUPUI:

- (1) Member, Sabbatical Review Committee, 2002, 2003.
- (2) Member, Search Committee, Dean of SLA, 1997-8.
- (3) Member, Priorities Planning Committee, 1997-8.
- (4) Member, Nominations Committee, 1997-8.
- (5) Resources and Planning Committee, 1995-1997.
- (6) Committee on Sensitivity towards Minorities, 1994.

College of Arts and Sciences, VPI&SU:

- (1) Planning Committee, 1989-1991 (designed and implemented survey of departmental advising policies and structures).

College of Business, VPI&SU:

- (1) Undergraduate Curriculum Committee, 1983; 1988.
- (2) Continuing Education Committee, 1986.

University committee service at campus or university level:

IUPUI

- (1) Campus Promotion and Tenure Committee, 2010-2011.

VPI&SU:

- (1) Commission on Undergraduate Studies, 1988.
- (2) Faculty Counselor, Honor Court, 1987-1991.
- (3) Faculty Representative, Honor Court, 1984-1986.

Professional Activities

- (1) Keynote speaker, Second Annual Conference, Australia/New Zealand Society for Third-Sector Research, Brisbane, Australia (talk entitled "The Clash of Values in Civil Society"), 1994.
- (2) Plenary speaker:
 - Australian Nonprofits Research Conference, Melbourne, Australia (talk entitled "Collective Goods as a Window on Nonprofit Economics), 1998.
 - ARNOVA Annual Conference, Arlington, VA, 1999 (panelist, with Mary Frances Berry and Francis Fukuyama, entitled "Social, Political and Economic Forces Facing the Nonprofit Sector on the Eve of the New Millennium").
 - Conference on Nonprofit Governance, NYC Federal Reserve Bank, 2004 (talk entitled "Are the Incentives Right?")
 - ARNOVA Annual Conference, Washington DC, 2005. Chair, Plenary on The Nonprofit Sector: A Research Handbook, Second Edition.
 - International Conference on the Economics of Charitable Giving, Mannheim, Germany. (talk entitled "Inheritance and Charitable Donations")
- (3) Invited speaker at international research conference: "What Should Social Finance Invest in and With Whom? at International Symposium of Philanthropy and Commerce, Renmin University, Beijing (October 2018), "Much Ado about Social Investment: An Economist's Ramble" at the Seminar on the Economics of Social Investment, sponsored by Oxford University's Said School of Business and the Open University Business School. "Comparative Corporate Governance for Nonprofit Organizations – An international and interdisciplinary VolkswagenStiftung conference" July 2006 in Heidelberg, Germany. "The Economics of Giving, Reciprocity, and Altruism," organized by the Institut d'Economie Publique, Marseille, France, 2002. "Contracting - Selling or Shrinking," organized by the National Council for Voluntary Organisation and U. of South Bank, London, England, 1993. "Non Profit Maximizing Firms and the Cooperative Sector," organized by the Center for International Economics and Finance, Center for Operations Research and Econometrics, and Polytechnic University of Aix, Aix-en-Provence, France, 1991.
- (4) Invited research seminars presented at:
 - SUNY at Albany (1981)
 - U. of Wyoming (1981)
 - Yale U. (1981)

United Way Research Institute (1985)
 Universidad do Porto (Portugal) (1986)
 SUNY at Stony Brook (1987)
 Northwestern U. (1991, 1992, 1993, 2002)
 U. of Chicago (1991)
 Oberlin (1991)
 Case Western Reserve U. (1991)
 National Center for Voluntary Organisation (London) (1993)
 University of Technology, Sydney (Australia) (1994, 2003)
 Queensland University of Technology (Australia) (2003)
 University of Queensland (Australia) (2003)
 University of Western Ontario (1995)
 Vanderbilt University (1996)
 Indiana University (Bloomington) (1996, 2002, 2006)
 University of Memphis (2006)
 CERGE-EI (Czech Republic) (2006)
 Vienna University of Economics and Business Administration (2008).
 University of Wisconsin-Milwaukee (2011)
 Interdisciplinary Center for Economic Science, George Mason University (2014).
 University of Illinois-Champaign/Urbana (2018).

- (5) Competitively-selected research presentations at international research conferences:
- Annual Regional Science Association Conference, Montreal, Canada, 1981
 - National Council for Research and Development Conference on Voluntarism, Non-governmental Organizations and Public Policy, Jerusalem, Israel, 1989
 - Annual AVAS (now ARNOVA) conference, London, England, 1991
 - Annual ARNOVA conference, Toronto, Canada, 1993
 - Annual ARNOVA conference, Montreal, Canada, 2002
 - Inaugural conference of the International Society for Third-Sector Research (ISTR), Pecs, Hungary, 1994
 - Biennial conference of ISTR, Mexico City, Mexico, 1996.
 - Biennial Conference of ISTR, Geneva, Switzerland, 1998.
 - Biennial Conference of ISTR, Cape Town, South Africa, 2002.
 - Biennial Conference of ISTR, Bangkok, Thailand, 2006.
 - Annual ARNOVA conference, Toronto, Canada, 2011.
 - Biennial Conference of ISTR, Sienna, Italy, 2012.
 - Biennial Conference of ISTR, Muenster, Germany, 2014.
 - Biennial Conference of ISTR, Stockholm, Sweden, 2016.

- (6) Competitively-selected or invited research presentations at domestic professional-society conferences include:

American Economics Association, 1982, 1985, 1987, 1990, 2003, 2011
 ARNOVA/AVAS, 1984, 1986, 1988-1993, 1995-2017
 Independent Sector Spring Research Forum, 1985, 1986, 1991, 1995
 National Society of Fund Raising Executives Annual Conference, 1995
 Association of Fundraising Professionals, Chicago Chapter, 2003
 Regional Science Association, 1987
 Eastern Economics Association, 1988
 Southern Economics Association, 1988
 National Tax Association, 1991
 American Bar Association, Section on Antitrust, 1991

- (7) Invited speaker, commissioned paper, or panelist at small, selective, special-topic conferences at:
- Columbia U., Center for Law and Economic Studies (Economics of Nonprofit Institutions), 1984
 - Brookings Institution (Effects of Tax Reform on Individual Charitable Giving), 1985
 - Economics of Chesapeake Bay Management Annual Conferences, Annapolis Md., 1987 and 1989
 - Case Western Reserve U., Mandel Center for Nonprofit Organizations (Legal Issues in Philanthropy), 1988; (Nonprofits in a Market Economy), 1991
 - Research Conference on the Commercial Activities of Nonprofits, New York City, 1988
 - Duke U., Center for the Study of Philanthropy and Voluntarism (Annual Economic Research Fora), 1988 and 1989
 - New York University, Program on Philanthropy and the Law (Charitable Solicitation: Is there a Problem?), 1990; (The Rationale for Exempting Nonprofit Organizations from Taxes other than Income Taxes), 1993; (The Antitrust Case against MIT for Collusion in Granting of Financial Aid), 1994; (Taxing Charitable Investments), 2000; (Managing Charitable Assets: Theory, Laws, Accounting Rules, and Practice), 2003; (Structures at the Seam: The Architecture of Charities' Commercial Activities), 2008.
 - Indiana U., Center on Philanthropy (Taking Fundraising Seriously), 1990, 1996, 2003; (Giving and Volunteering Conference), 2000; (Planning Seminar on Philanthropic Studies and Liberal Education), 2000
 - Indiana U., Institute for the Study of Government and the Nonprofit Sector (Contracting, Outcome Measurement, and Evaluation Techniques), 1999.
 - Northwestern U., Center for Urban Affairs and Policy Research (Nonprofits under Attack), 1991
 - Nonprofit Almanac Symposium, Washington DC, 1992
 - Conference on Charitable Statistics, Washington DC, 1992
 - American Association of Fundraising Counsel (Refining Estimates of National Charitable Activity), 1993
 - Central Regional Tax Institute on Exempt Organizations, Indianapolis, 1993
 - New School for Social Research (The New York City Philanthropy Study), 1993
 - University of Ljubljana (Slovenia) (A Comparative Approach to a Civil Society), 1994
 - Philanthropy Monthly Annual Policy Conference, 1994
 - Aspen Institute, Nonprofit Sector Research Fund (Financing the Nonprofit Sector: New Directions and Challenges for the 21st Century), 1994
 - The Free Speech Coalition, Inc., Annual Leadership Conference, 1994
 - National Society of Fund Raising Executives, Think Tank on Fund Raising Research, 1995
 - Seminar on Emerging Issues in Philanthropy, Urban Institute and Hauser Center (Harvard), 1999.
 - Urban Institute (Property Tax Exemption for Charities: The War Within the States), 2000
 - The Open University and Oxford U. Business School (The Economics of Social Investment), 2009.
 - Syracuse and Georgia State Universities (Competition and Policy for Nonprofit Organizations), 2013.
 - National Center for Nonprofit Enterprise, Cleveland State U., and Edward Elgar Publishing, (Wise Economic Decision Making: Implications from Nonprofit Research) 2017.
- (8) Testified before the U.S. Congress on competition between nonprofits and for-profits. Consulted by the Industry Commission (Australia) on their major study on the role and

regulation of nonprofits in Australia. Technical advisor, ACFRFR (American Charities for Reasonable Fundraising Regulation), which coordinated the writing of three Amicus Curiae Briefs submitted to the Supreme Court of the United States in the case of *Madigan v. Telemarketing Associates*

Grants

- (1) Grant entitled "Empiric Analysis of the Relations between Government Spending and Charitable Donations," funded by Program on Nonprofit Organizations, Yale University, August 1984-1990, \$7250.
- (2) Grant entitled "Public-Private Partnerships for Affordable Housing in International Perspective" (with C. Theodore Koebel and Robert Dyck) funded by FANNIE MAE, November 1991 - June 1992, \$23,475.
- (3) Grant entitled "Research on the Regulation of Nonprofit Organizations" funded by the IU Center on Philanthropy, 1992, \$5,000.
- (4) Grant entitled "Nonprofit/For-Profit Competition Revisited: Do differential Subsidies Help or Hurt Society" (with Catherine Eckel) funded by the Initiative on Nonprofit Entrepreneurship at NYU, 1992-3, \$8650.
- (5) Grants entitled "Public Policy towards Nonprofit Organizations" (\$5,000), and "Reward Structures in Public-Good Experiments" (with Martin Sefton) (\$1200) funded by the IU Center on Philanthropy, 1993. Grant in support of first annual Workshop in Nonprofit Economics funded by the Center, 1994.
- (6) Grants to support ARNOVA totalling \$356,000 over 3 years funded by the W.K. Kellogg Foundation, the Ford Foundation, and by an anonymous donor. Grant totalling \$1500 to support ARNOVA pledged by the Aspen Institute Fund for Nonprofit Research, 1994. I played a major, but by no means exclusive role in these efforts.
- (7) Grant entitled "Corporate Matching Gift Programs and their Effect on Donations to Nonprofit Organizations," (with Rika Beckley and Tony Lentych) (\$2000) funded by the research council of the National Society of Fund Raising Executives, 1997.
- (8) Strategic Directions Charter grant, entitled "Strengthening Nonprofit Economics and Public Policy at IUPUI," (with Gerard Wedig). \$200,000 over 2 years (AY 98 and 99).
- (9) Grant in support of preparation of a volume of commissioned papers entitled The Nonprofit Sector: A Research Handbook (Walter W. Powell and myself as editors), the R.J. McCormick Tribune Foundation. \$110,000, 2000. Additional grants from Stanford Business School, \$20,000, the Aspen Institute Nonprofit Sector Research Fund, \$15,000 and IU Center on Philanthropy Research Fund, \$20,000.
- (10) Grant entitled "Four Experiments on the Voluntary Provision of Collective Goods" (with Lise Vesterlund and Martin Sefton) funded by the IU Center on Philanthropy's IU Research Fund. Initial grant of \$15,510 with supplement of \$5,000, 2000-1.
- (11) Grant to support research using the Center on Philanthropy Panel Study (with Mark Wilhelm) funded by the IU Center on Philanthropy Research Fund. \$13,500, January 1-Dec. 31, 2003. Additional supplement of \$3500 Jan-May 2004.

- (12) Grant entitled "Persuasion in Fund Raising Letters: An Interdisciplinary Study" (with Ulla Connor, Ed Nagelhout, and Elizabeth Goerring) funded by the IU Center on Philanthropy's IU Research Fund. \$45,009.
- (13) Grant entitled "Taxes and Giving Using COPPS Data" (with Mark Wilhelm) funded by IU Center on Philanthropy. \$15,000, Summer 2005.
- (14) Grant entitled "Inheritance and Charitable Donations" funded by the IU Center on Philanthropy's IU Research Fund \$22,273, Summer 2007-2009.
- (15) Grant entitled "Towards Integrated Models of Nonprofit Organizations: Genesis, Objectives, and Transformation" funded by the Center on Philanthropy at IU's Research Fund. \$19766.40, July 1, 2009-June 30, 2011.
- (16) Grant entitled "The Framing Effects of Public-Service Club Membership" (Heng Qu, co-PI) funded by the Science of Philanthropy Initiative at the University of Chicago. \$5,000. Sept. 2013-August 2014.
- (17) Data acquisition grant for "Competition and "Other Community Benefits" provided by Nonprofit Hospitals: Beyond Uncompensated Care." Funded by the Lilly Family School of Philanthropy. \$1600, Spring 2014.
- (18) Grant entitled "Generosity in Time and Money" (Barbara Duffy, Ruth Hansen, and Yuan Tian, Co-PIs) funded by the Lilly Family School of Philanthropy. \$5590. May 2016-April 2018.

EXHIBIT B

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

Style Definition: Heading 2: Indent: Left: 0.5",
Hanging: 0.25"

In the Matter of:

DETERMINATION OF RATES
AND TERMS FOR DIGITAL
PERFORMANCE OF SOUND
RECORDINGS AND MAKING OF
EPHEMERAL COPIES TO
FACILITATE PERFORMANCES
(*WEB V*)

Docket No. 19-CRB-0005-WR
(2021-2025)

AMENDED WRITTEN DIRECT TESTIMONY OF
RICHARD STEINBERG,

Professor of Economics and Philanthropic Studies
The Lilly Family School of Philanthropy
on the IUPUI campus of Indiana University

(On behalf of the National Religious Broadcasters
Noncommercial Music License Committee)

~~September 23~~ December 11, 2019

TABLE OF CONTENTS

	<u>Page</u>
I. QUALIFICATIONS AND ASSIGNMENT	1
A. Qualifications	1
B. Assignment	3
II. PRIOR RULINGS OF THE JUDGES	5
III. WILL THE NONCOMMERCIAL EDUCATIONAL AND COMMERCIAL WEBCASTING MARKETS CONVERGE AND OVERLAP WHEN NONCOMMERCIAL EDUCATIONAL LISTENERSHIP RISES?	6
A. Background	7
B. NCE Webcasters Constitute a Distinct Market Segment that Does Not Compete or Overlap with the Commercial Segment Regardless of Market Size	10
C. Charging Commercial Rates for NCE Performances Exceeding an ATH Threshold Is Unwarranted	13
D. Charging Commercial Rates for NCE Performances Exceeding an ATH Threshold has Harmful Side Effects	14
IV. NONCOMMERCIAL EDUCATIONAL BROADCASTERS SHOULD ENJOY LOWER THAN COMMERCIAL RATES As the outcome of transactions between willing buyers and willing sellers	15
A. By Prior Rulings of the Judges	15
B. By Revealed Preference	15
C. By Economic Practice in a Variety of Contexts	20
D. Lower than Commercial Royalty Rates Will Not Cannibalize the Commercial Submarket	21
V. CHARACTERISTICS OF REASONABLE RATE PROPOSALS	27
A. Flat Fees, or Tiered Flat Fees Should be Employed	27
B. If the Judges Reject Tiered Flat Fees Entirely, or if they Select Tiered Flat Fees and Rates, NCE Rates for Usage in Excess of Some Threshold Should be Lower than Commercial Rates	29

C. If the Judges Reject Tiered Flat Fees, then Whether an NCE Exceeds Some Threshold Should Be Evaluated on an Annual, Rather than Monthly Basis.	31
D. If the Judges Reject Tiered Flat fees, then the Listenership Threshold for paying Usage Rates Should be Increased.	31
VI. References	32
VII. Appendix: Works Consulted	34
I. QUALIFICATIONS AND ASSIGNMENT	1
A. Qualifications	1
B. Assignment	3
II. PRIOR RULINGS OF THE JUDGES	5
III. WILL THE NONCOMMERCIAL EDUCATIONAL AND COMMERCIAL WEBCASTING MARKETS CONVERGE AND OVERLAP WHEN NONCOMMERCIAL EDUCATIONAL LISTENERSHIP RISES?	6
A. Background	7
B. NCE Webcasters Constitute a Distinct Market Segment that Does Not Compete or Overlap with the Commercial Segment Regardless of Market Size	10
C. Charging Commercial Rates for NCE Performances Exceeding an ATH Threshold Is Unwarranted	13
D. Charging Commercial Rates for NCE Performances Exceeding an ATH Threshold has Harmful Side Effects	14
IV. NONCOMMERCIAL EDUCATIONAL BROADCASTERS SHOULD ENJOY LOWER-THAN-COMMERCIAL RATES As the outcome of transactions between willing buyers and willing sellers.	15
A. By Prior Rulings of the Judges	15
B. By Revealed Preference	15
C. By Economic Practice in a Variety of Contexts	20
D. Lower-than-Commercial Royalty Rates Will Not Cannibalize the Commercial Submarket	21
V. CHARACTERISTICS OF REASONABLE RATE PROPOSALS	27

A.	Flat Fees, or Tiered Flat Fees Should be Employed.....	27
B.	If the Judges Reject Tiered Flat Fees Entirely, or if they Select Tiered Flat Fees and Rates, NCE Rates for Usage in Excess of Some Threshold Should be Lower than Commercial Rates.....	29
C.	If the Judges Reject Tiered Flat Fees, then Whether an NCE Exceeds Some Threshold Should Be Evaluated on an Annual, Rather than Monthly Basis.	31
D.	If the Judges Reject Tiered Flat fees, then the Listenership Threshold for paying Usage Rates Should be Increased.....	31
VI.	References.....	32
VII.	Appendix: Works Consulted	34

I. QUALIFICATIONS AND ASSIGNMENT

A. Qualifications

1. My name is Richard Steinberg. I am a Professor of Economics in the School of Liberal Arts and Professor of Philanthropic Studies in the Lilly Family School of Philanthropy at Indiana University Purdue University Indianapolis (IUPUI), which Schools reside in the Indiana University system and are located in Indianapolis, IN. I graduated from MIT with an S.B. degree in Economics and received my Ph.D. in Economics from the University of Pennsylvania in 1984. Almost all of my research concerns nonprofit organizations and philanthropic behaviors.
2. I have spent my career developing this field of study, first at the Department of Economics at Virginia Tech, then while a member of the Center on Philanthropy at IUPUI, which later became the Lilly Family School of Philanthropy. While there, I helped develop three interdisciplinary graduate degree programs (M.A. in Philanthropic Studies, M.P.A. with concentration in Nonprofit Management, and Ph.D. in Philanthropic Studies) and regularly teach a required doctoral course and required option at the masters level- (they must take either my course or a course in Nonprofit Law). I served as Chair of the Faculty in Philanthropic Studies from 1997-99; proposed the first longitudinal study of individual giving and volunteering, the Philanthropy Panel Study, a module appended to the biennial Panel Study on Income Dynamics at the University of Michigan, and helped with its development; and founded a weekly seminar (the Philanthropy Research Workshop) for the faculty and students in Philanthropic Studies where authors discuss their research in progress.
3. I am the author or editor of five books, of which the most relevant is the just published *Economics for Nonprofit Managers and Social Entrepreneurs* (Edward Elgar, 2019, with

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coauthors D.R. Young, R. Emanuele, and W. Simmons). I have also coedited the authoritative reference work, *The Nonprofit Sector: A Research Handbook*, 2nd Ed. (Yale University Press, 2006, Walter W. Powell coeditor) and authored the chapter Economic Theories of Nonprofit Organizations therein. I am the author or coauthor of 29 publications in refereed academic journals, including *The American Economic Review*, *The Rand Journal of Economics*, *Journal of Public Economics*, *National Tax Journal*, *Nonprofit and Voluntary Sector Quarterly*, *Nonprofit Management and Leadership*, and *Voluntas*. The following articles or book chapters help to establish my expertise on nonprofit pricing and competition between and among nonprofit and for-profit organizations:

- Steinberg, R. (1991) "'Unfair' Competition by Nonprofits and Tax Policy," *National Tax Journal*, 44#3
- Steinberg, R. and B. Galle. (2018) A Law and Economics Perspective on Nonprofit Organizations. in M. Harding (ed.) *Research Handbook on Not-for-Profit Law* (Edward Elgar).
- Steinberg, R. (2006). Membership Income. In D.R. Young (ed.) *Financing Nonprofits: Putting Theory Into Practice*. Altamira Press and the National Center for Nonprofit Enterprise.
- Steinberg, R. and B.A. Weisbrod (1998). Pricing and Rationing by Nonprofit Organizations with Distributional Objectives. In B.A. Weisbrod (ed.) *To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector*. Cambridge University Press.
- Steinberg, R. (1997). Competition in Contracted Markets. In P. 6 and J. Kendall (eds.) *The Contract Culture in Public Services*. Ashgate.

4. I have served the development of my field as President of The Association for Research on Nonprofit Organizations and Voluntary Action (ARNOVA), the primary multidisciplinary academic society; as a member of the Governing Council at the Aspen Institute Nonprofit Sector Research Fund; as a research consultant for the Project on the Growing Commercialism of Nonprofit Organizations (at Northwestern U.); and as a member of

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several academic journal editorial boards. I was recognized by my appearance on the Power and Influence Top 50 list by the *Nonprofit Times* in 1998. I have testified before the U.S. Congress on competition between nonprofits and for-profits.

5. I was an expert witness before the U.S. tax court in the case of *United Cancer Council v. Commissioner of the IRS* (concerning revocation of tax-exempt status). At trial, lawyers for the IRS challenged my expertise and the judge ruled that I qualify as an expert witness on nonprofit organizations and charitable fundraising. I have also served as an expert witness in 3 cases on valuing economic damages, 11 cases on state regulation of fundraising, 1 case on interpretation of nonprofit status in the Commonwealth of Puerto Rico, and 1 case of wrongful dismissal of a nonprofit CEO.

B. Assignment

6. I have been asked to consider and discuss the characteristics of nonprofit organizations and differences between nonprofit and for-profit organizations and assess whether these differences warrant different sound recording royalty rates for nonprofit than for-profit webcasting organizations and/or a difference in the way those rates are structured.
7. In undertaking this analysis, I have read Laws, Final Orders of the Copyright Royalty Judges, the Copyright Arbitration Royalty Panel Report in a prior webcasting proceeding, and the testimony of various witnesses and have accessed web sites and IRS Forms 990. The list of materials that I considered in preparing this written direct testimony is attached as an Appendix. I also refer to several articles and books listed in the Reference section of this testimony.
8. The structure of this testimony is as follows. In Section 2, I summarize prior Copyright Royalty Judge rulings that are relevant to the issues I am considering, as I understand them.

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In Section 3, I discuss reasons why the right to perform sound recordings in commercial webcasts and the right to perform sound recordings in noncommercial educational¹ webcasts are separate markets (or market segments, if you prefer) and show that listenership levels have nothing to do with this separation. In Section 4 I argue that sound recording royalties for noncommercial educational webcasting should be levied at lower-than-commercial rates and rebut the assertion that lower rates would cannibalize the commercial market. In the concluding section, I characterize a series of reasonable proposals for noncommercial fee structures and rates, offering fallback options if the Judges ultimately accept some of my arguments and reject others.

9. This amended testimony includes an expanded Section IV.B, which discusses two noncommercial settlement agreements covering NCE statutory webcasting of sound recordings and related ephemeral recordings for 2021-2025 that SoundExchange entered into with College Broadcasters, Inc. (CBI) and NPR, consisting of National Public Radio and the Corporation for Public Broadcasting, that I did not have access to at the time I finalized my Written Direct Testimony. I understand that the NRBNMLC requested these agreements and related negotiation and valuation documents during discovery and that SoundExchange has agreed to search for and produce at least some such documents. As of the date of this

¹ I understand that the Judges have used the term “noncommercial educational” to refer specifically to noncommercial webcasters that meet five conditions listed in 37 C.F.R. Part 380 Subpart C. These are webcasting channels affiliated with accredited post-secondary educational institutions whose operations are staffed substantially by students. In contrast, I use the term, usually abbreviated as NCE, to mean organizations defined by the Federal Communications Commission in 47 USC § 397(6). These are radio broadcast stations that are eligible to be licensed by the Commission as a noncommercial educational radio broadcast station and are owned and operated by a public agency or nonprofit private foundation, corporation, or association. Thus, in addition to stations meeting the CRB definition of the term, I include nonprofit religious and public radio stations that advance an educational purpose and follow FCC requirements to be so licensed. In turn, I refer to webcasting conducted by NCE broadcasters as NCE webcasting.

amended testimony, however, I have not yet had access to those documents. I reserve the right to amend my testimony further in light of these and any other noncommercial documents that SoundExchange produces after the close of discovery once I have had a reasonable opportunity to review them.

II. PRIOR RULINGS OF THE JUDGES

~~9~~10. In preparing my testimony, I have read prior rulings of the Judges and rely upon my understanding of their rulings. I will not retrench this ground and include this discussion only as background. First, I understand that there is legislative guidance provided to the CRB that the Judges must set rates in accordance with those that would emerge from agreements between willing buyers and sellers absent the statutory license. Guidance since then has provided more detail – the willing traders operate in a “workably” or “reasonably” competitive market. The operational definition of “reasonably competitive” has evolved from “bargaining from a position of equal power” to a market reflecting significant price competition among sellers. *See* Web IV, 81 Fed. Reg. at 26344 (finding that a “market where record companies did not engage in price competition was not effectively competitive”); *ibid.* (“Thus the rate set in Dr. Rubinfeld’s upstream interactive benchmark market can and should be adjusted to reflect such price competition, in order to render it [a]s usable as an “effectively competitive” rate in the segment of the market to which that benchmark applies – the noninteractive subscription market.”) The buyer in this hypothetical deal is the webcasting service and the sellers are the record companies. The current statutory rate structure offers noncommercial webcasters lower average rates because listenership levels below a monthly aggregate tuning hours (ATH) of 159,140 require payment of a flat \$500 fee, with commercial rates applicable for listenership above that threshold. Finally, rights to

make ephemeral recordings that are needed for webcasting are paid together with digital broadcast rights, amounting to 5% of the fees detailed above.

III. WILL THE NONCOMMERCIAL EDUCATIONAL AND COMMERCIAL WEBCASTING MARKETS CONVERGE AND OVERLAP WHEN NONCOMMERCIAL EDUCATIONAL LISTENERSHIP RISES?

~~10.11.~~ Noncommercial educational (NCE) broadcasters are licensed by the FCC to operate as noncommercial educational radio stations if they meet operational and ownership restrictions discussed below. I understand that virtually all noncommercial broadcasters represented by ~~the~~ NRBNMLC broadcast under noncommercial educational broadcast licenses granted by the FCC and that virtually all of the webcasting conducted by NCE broadcasters consists of online simulcasting. I therefore focus my testimony on the NCE portion of the noncommercial webcasting population.

~~11.12.~~ The Judges have expressed the view that noncommercial webcasters, including those with NCE broadcast licenses, constitute a distinct market segment and that the distinction between NCE and commercial webcasts should be protected. I wholeheartedly agree. Where we disagree is on whether listenership levels are any part of what makes NCE webcasters distinct, and therefore on whether listenership-based imposition of commercial rates above certain levels helps to keep those markets from overlapping. In subsection A below, I provide background on why NCE webcasters are different from commercial webcasters. In subsection B, I show that these differences imply that NCE webcasts constitute a distinct market (or market segment) regardless of listenership. Subsection C shows that imposing commercial rates on NCE webcasters above a certain ATH threshold is unwarranted, and subsection D shows that such an imposition has harmful side effects on the charitable mission of NCE webcasters.

A. Background

~~12.~~13. NCE webcasters are without exception donative nonprofit organizations that are both noncommercial and educational in nature. In this subsection, I will elaborate on the nature of nonprofit organizations, the distinction between donative and commercial nonprofits, and FCC conditions for granting NCE status to a broadcaster.

~~13.~~14. Nonprofit organizations are chartered by the states under a variety of names (not-for-profit, nonprofit, eleemosynary, etc.). Yale Law and Economics Professor Henry Hansmann (1980) found that all state nonprofit corporation statutes shared the restriction that their profits cannot be distributed, labeling this the “nondistribution constraint.”² This distinction has been accepted as the defining characteristic of “nonprofit” in virtually all the subsequent academic literature. The nondistribution constraint ensures that all financial surplus (generated through donations, sales of goods and services, and various other minor revenue sources) is dedicated to the charitable mission of the organization. Even on dissolution, remaining financial surplus must be donated to another nonprofit organization with the closest possible mission to ensure that no financial surplus inures to the benefit of anyone who controls the use of organizational assets (e.g., Brody 2006).

~~14.~~15. Organizations precluded from distributing profits have different objectives, constraints, and revenue sources than for-profit enterprises (e.g., Steinberg 2006). These differences affect nonprofit willingness-to-buy and thus affect the price in contracts between willing

² “A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees. By “net earnings” I mean here pure profits - that is, earnings in excess of the amount needed to pay for services rendered to the organization; in general, a nonprofit is free to pay reasonable compensation to any person for labor or capital that he provides, whether or not that person exercises some control over the organization.” (Hansmann, 73, The Role of Nonprofit Enterprise, at 835).

buyers and willing sellers. Specifically, nonprofits are mission-, rather than profit-driven. With no shareholders demanding return on their investment, nonprofits are free to pursue their charitable and educational missions subject only to the need to remain solvent. There is no financially motivated market for the control of nonprofit organizations because ownership rights cannot be sold at a profit without violating the nondistribution constraint. Hence, the threat of takeover bids does not force nonprofits to compromise their mission in order to obtain higher profits. Nonprofit organizations cannot issue meaningful shares of stock to raise capital (because receipt of dividends or capital gains would represent a distribution of profits) but can obtain donations (because donors are assured that no portion of their donations will be distributed to owners). Both nondistribution of profits and the resulting noncommercial activities of nonprofit organizations provide important signals to stakeholders that the organization is sincerely pursuing its charitable and educational missions. This last point is particularly relevant for religious webcasters, as I will show when I turn from general background to the separation between NCE and commercial webcaster markets.

~~15-16.~~ In general, nonprofit organizations receive revenues from a variety of sources: gifts, grants, and contributions; sales of goods and services; returns on endowment and reserve funds; property rentals; royalties; and several other minor categories. Hansmann (1980) observed that few nonprofit organizations have an equal mix of donations and sales, labeling those nonprofits that receive the bulk of their revenues from gifts, grants, and donations “donative nonprofits” and those that receive the bulk of their revenues from sales of goods and services and government contracts as “commercial nonprofits.” Nonprofit webcasters are

clearly donative nonprofits, receiving almost all their revenues from listener donations.³ This is particularly true for NCE webcasters, who are prohibited from obtaining advertising revenues from their broadcast programming so that their simulcasts streams are similarly devoid of such commercial content.

~~16~~17. Donative nonprofit organizations suffer from “philanthropic insufficiency” (Salamon, 1986) due to the well-known free rider problem.⁴ Specifically, donors are contributing to a collective good (also known as a “public good”) where one donor’s consumption of that good (furthering the nonprofit mission) is nonrival with other donors’ consumption. Anyone can consume the results of total donations (religious broadcasting and webcasting) whether they have personally contributed or not, so that there is a natural tendency to let others donate while taking a free ride on the output. As a result, and with rare exceptions, donative nonprofits are bare-bones operations that often struggle to survive.

~~17~~18. NCE broadcasters are prohibited from allowing advertising (47 U.S.C. section 399b). The regulations provide that “No *promotional* announcement *on behalf of for profit entities* shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to

³ Some of their financial support comes in the form of cost-sharing, which is essentially equivalent to a voluntary donation, even though it is listed separately in the informational tax returns (Form 990) filed by most nonprofits. Cost-sharing includes free or reduced-cost use of facilities (perhaps provided by a sponsoring Church in the case of noncommercial religious broadcasters) and either for-profit or nonprofit underwriting.

⁴ In game-theoretic economic terms, the free-rider problem is that Nash-equilibrium total donations are suboptimal; a higher level of average giving would improve the collective output in a way that would make all donors better off. The free-rider problem is less severe when donors receive “warm glow” from the act of giving that is distinct from their utility from consuming the collective good. (Andreoni, J. (1990). Impure altruism and donations to public goods: A theory of warm-glow giving. Cornes, R., & Sandler, T. (1996). *The theory of externalities, public goods, and club goods*.). It is also less severe because the nondistribution constraint solves the related principal-agent problem that donors would otherwise not know whether their gift supported increases in the collective good or increases in shareholder dividends (Bilodeau, M., & Slivinski, A. (1998). Rational nonprofit entrepreneurship). But the problem remains substantial, as any listener to NPR pledge drives knows.

the licensee, its principals, or employees. However, acknowledgements of contributions can be made. *The scheduling of any announcements and acknowledgements may not interrupt regular programming*, except as permitted under paragraph (e) of this section” [referring to on-air fundraising activities]. 47 CFR §73.503(d) (emphasis in original; ~~47 CFR §73.503(d)~~). In addition, NCE licensees must be educational nonprofits and show that their station will be used to advance an educational program (47 USC §397; *see also* 47 USC §396 and 47 CFR §73.503(a)).

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B. NCE Webcasters Constitute a Distinct Market Segment that Does Not Compete or Overlap with the Commercial Segment Regardless of Market Size

~~18.19.~~ Commercial webcasters solve a standard economics problem in deciding whether to buy performance and ephemeral copy licenses from the record companies. Willingness to buy is based solely on profit maximization, which requires picking a mix of songs, broadcast and webcast options, and formats that maximize the listening audience. This is because advertising revenue is directly proportional to listenership. In contrast, NCE webcasters solve a different economics problem, that of mission maximization.⁵ NCE willingness to buy is based on choosing the song mix, webcast options, and formats that best advance the educational and charitable mission of the station. It is important that the NCE attract the right kind of listener, listening for the right reasons, and changing behaviors, knowledge, and

⁵ Economist Estelle James (1983) developed an appropriate model based on mission maximization. Her nonprofit organizations had preferences over activities, classified into favored (the activity advances the mission directly), neutral (the activity does not advance the mission directly but generates net revenues that can be devoted to the mission) and disfavored activities (those that directly hinder the mission but are sufficiently lucrative that they can advance the mission by generated revenues). The quantity of favored activity selected by nonprofits exceeds the quantity that would maximize profits, and any losses from the favored activity are cross-subsidized by net revenues from neutral and disfavored activities. In the NCE context, educational and religious messages are the favored activity, and fundraising is a disfavored activity since it uses up on-air time that would otherwise be devoted to promoting the educational and religious mission.

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beliefs in response to what they hear. Popular songs that bring in lots of listeners but do not advance the educational mission will not be selected, especially so because NCE webcasters are prohibited from monetizing listenership through advertising. This reduces NCE ability and hence willingness to pay to a level that is significantly below that of commercial for-profit webcasters.

~~19-20.~~ Commercial webcasters profit from advertising revenues that depend proportionally on their listenership, but listeners otherwise play no role in profit maximization. In contrast, NCE webcasters receive the bulk of their revenues from donors including listener-donors during or in response to on-air fund drives. Donations may go up when the number of *broadcast* listeners increase, but we do not have any reason to believe that donations are proportional to broadcast listenership. More importantly, it is unclear whether donations increase at all in response to *webcast* listenership, as at least for NRBNMLC webcasters virtually all, if not all webcasting is in the form of simulcasting (this is probably also true for other NCE webcasters, but I have less information about them). Typically, those who listen to simulcasts also listen to broadcasts when radios are available and they are within broadcast range, and on-air fundraising drives are pervasive enough that these listener-donors would give regardless of whether they heard about the drive in a simulcast. In sum, NCE ability to pay royalty fees does not increase proportionally with webcast listenership. Hence Mr. Gene Henes, a witness presented by the NRBNMLC in a prior webcasting proceeding, testified “When our support does not increase in proportion with our listenership, it is fundamentally unfair that our expenses should do so.” (Henes WDT Web IV, ¶ 26. A similar point is made in Emert Web IV WDT ¶ 37).

~~20.21.~~ A final reason why NCE willingness to pay royalties is lower than that of commercial webcasters stems from the economic incidence of royalty fees. Economic incidence concerns the ultimate bearer of burdens after costs are transferred the original payor in the form of higher consumer prices, higher advertising prices, lower worker wages, or lower financial returns to shareholders. Commercial webcasters distribute the profits generated from license rights to shareholders, so that shareholders bear the ultimate burden of paying royalty fees.⁶ Shareholders who do not want to bear this burden can simply sell their shares, so we are left with owners who are willing to pay any increase in royalty fees.

~~21.22.~~ In contrast, royalty fees paid by NCEs come at the expense of donors and other stakeholders that care about the organization's charitable and educational mission. Organizational expenditures on mission consist of donations minus fees for the rights to webcast recordings (and other expenses, of course), so that donors would have to give more to accomplish the same outcome when royalty fees go up. Other stakeholders who support the charitable and educational mission are also burdened to the extent that increased donations do not cover increased royalty fees. These burdens cannot be transferred to others who are more willing to pay for increased royalty fees, so that NCE willingness to pay is correspondingly lower.

⁶ Consumers do not pay for webcasts, so bear none of the burden of licensing fees. Advertisers also bear none of the burden because the amount of advertising revenue received is insensitive to the structure of royalty fees. Advertisers are charged the maximum they are willing to pay when royalty fees are low, and they are willing to pay the same maximum amount when royalty fees are high. Worker wages are set by competitive labor markets and hence do not change when royalty fees change. Hence, the sole incidence of licensing fees lies on shareholders.

C. Charging Commercial Rates for NCE Performances Exceeding an ATH Threshold Is Unwarranted

22-23. The Judges in their Web II CRB Final Order acknowledge that there is “a distinct noncommercial submarket in which willing buyers and willing sellers would have a meeting of the minds that would result in a lower rate than the rate applicable to the general commercial webcasting market” and that “members of the noncommercial submarket, by definition, are not serious competitors with commercial webcasters” (72 Fed. Reg. 24084, 24100 (May 1, 2007)). They further state that “Mere size alone, without evidence of the other characteristics that define membership in the noncommercial submarket discussed supra at Section IV.C.2.a., does not make a webcaster eligible for this lower rate.” (*Ibid.*)

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23-24. It is therefore puzzling that the Judges selected performances above an ATH level as “a proxy for assessing the convergence point between Noncommercial Webcasters and Commercial Webcasters.” (~~*ibid*~~*ibid.*) If small size alone is insufficient to warrant distinct rates, then large size alone is insufficient to warrant identical rates that apply to streaming above the ATH threshold. None of the differences between NCE and Commercial webcasters discussed above changes when an NCE webcaster exceeds the number of listeners measured by the ATH. These differences exist and persist at all levels of listenership. Therefore, the penalty for alleged convergence (payment of commercial rates) is unrelated to any actual convergence.

24-25. The Judges had a difficult task reconciling the competing claims about the law and economics of price discrimination in royalty markets. Overall, I am impressed with the quality of the final determinations, but respectfully disagree with the portions of those determinations that discuss convergence. Perhaps the Judges were implicitly referring to a

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point developed elsewhere, the possibility that NCEs will cannibalize the commercial market when listenership exceeds 159,140 monthly ATH. One might rephrase the cannibalization point as “although NCEs constitute a distinct submarket at any level of ATH, this submarket endangers the commercial submarket when ATH is large.” However, I will argue below that the cannibalization argument is unsupported by the record and unlikely to occur. I therefore conclude that to the extent that convergence and overlap become a problem, commercial rates beyond an ATH threshold is not the solution.

D. Charging Commercial Rates for NCE Performances Exceeding an ATH Threshold has Harmful Side Effects

~~25-26.~~ When an NCE webcaster’s listenership approaches the ATH cap, they must consider whether to continue to allow listenership to increase and pay inappropriately high rates for doing so in order to pursue their charitable and educational mission, or limit access to webcasts and hence compromise their mission. The problem has already occurred. Joseph C. Emert, the President of Life Radio Ministries, Inc. testified in Web IV:

“I also am aware of noncommercial broadcasters who do stream, but they impose caps on the number of listeners their programming may reach to stay under the listenership level at which usage fees are owed. It is obviously not ideal for a noncommercial religious broadcaster to turn listeners away from their programming, as it works against our mission of reaching as many people as we can with our message of hope and inspiration, but some have chosen to do so as a preferred alternative to having to pay unpredictable and very expensive usage fees to SoundExchange that become even more unaffordable as listenership grows.” (Emert Web IV WDT ¶ 38).⁷

~~26-27.~~ Whether or not a significant number of webcasters bump up against the threshold is unimportant because the payment of commercial fees beyond the threshold is entirely

⁷ Likewise, Gene Henes, President of the Board of Praise Network, Inc., testified “I am aware of other noncommercial stations that [have listenerships approaching the ATH cap]. ... Some of these broadcasters have made the unappealing choice of turning listeners away rather than incurring significant costs.” (Henes WDT Web IV, ¶ 27.)

unwarranted. Thus, although I have no studies predicting how many NCE webcasters will approach the current threshold during the next five years, I urge the Judges to end this problem, weighing a harm against no benefits whatsoever.

IV. NONCOMMERCIAL EDUCATIONAL BROADCASTERS SHOULD ENJOY LOWER-THAN-COMMERCIAL RATES AS THE OUTCOME OF TRANSACTIONS BETWEEN WILLING BUYERS AND WILLING SELLERS.

A. By Prior Rulings of the Judges

27-28. In Web I, the CARP said this: “[T]he willing buyer/willing seller standard is the *only* standard to be applied. The two factors enumerated in the statute do *not* constitute additional standards or policy considerations.” The Judges ruled in Web II that: “certain ‘noncommercial’ webcasters may constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined . . . for Commercial Webcasters.” (72 Fed. Reg. at 24097). In Web IV they reiterated this point and offered additional justification: “a noncommercial religious broadcaster that streams a simulcast of its broadcasts is prohibited under FCC regulations from selling advertising.” (81 Fed. Reg. at 26319-20~~)).~~

B. By Revealed Preference

29. In Web II, the Judges noted: “there is a significant history of Noncommercial Webcasters such as NPR and the copyright owners reaching agreement on rates that were substantially lower than the applicable commercial rates over the corresponding period.” (72 Fed. Reg. at 24097). This point was reiterated in Web IV: “Indeed, the NRBNMLC and SoundExchange both proposed that the Judges adopt a different rate structure for noncommercial webcasters than for commercial webcasters, which suggests to the Judges that there is continued support

in the marketplace for a different rate structure for commercial and noncommercial webcasters” (81 Fed. Reg. at 26320).

30. I recently have gained access to two newly reached settlement agreements covering NCE statutory webcasting of sound recordings and related ephemeral recordings for 2021-2025 – one between SoundExchange and CBI (NRBNMLC Ex. 20) and the other between SoundExchange and NPR (NRBNMLC Ex. 21). Both settlements provide examples of the types of agreements that noncommercial organizations negotiate. Either could be adjusted to serve as a starting point for developing Web V fee structures for noncommercial educational webcasters.

31. The CBI agreement requires eligible stations to pay fixed annual fees for the ability to stream 159,140 monthly ATH (Joint Motion To Adopt Partial Settlement filed by SoundExchange, Inc. and CBI, Docket No. 19-CRB-0005-WR (Sept. 23, 2019) at 7). These fees rise by \$50 each year thereafter, reaching \$750 in 2025. (*Ibid.*). These fees emerged from willing buyers and sellers, and are, if anything, too high for broader application. For CBI, the avoidance of litigation costs is an element of value separate from and in addition to the value of webcast rights, whereas SoundExchange gains no comparable reduction in litigation costs because rates must still be set for non-settlers. Therefore, the CBI settlement rates are above the upper bound of a reasonable rate for webcast rights.⁸

⁸ The argument is similar to the analysis of the Yahoo! agreement in Web I, where CARP, the Librarian, and the Court of Appeals for the DC Circuit agreed that arbitration cost savings realized in agreements resulting in the withdrawal from litigation should be factored into reasonable rate calculations. In that case, the Librarian declined to make this adjustment because of difficulties in quantification and the fact that rates remained in a reasonable range without the adjustment. See Report of the CARP Web I (Interim Public Version) at 67-69; 67 Fed. Reg. 45240 (Librarian Ruling) at 45,255; and *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d939, 952-53(D.C. Cir. 2005).

32. Stations that exceed the monthly ATH limit must pay the default noncommercial rates that will be set by the Judges in Web V. *Ibid.* at 7. However, I have reviewed data from SoundExchange, and it does not appear that any CBI webcaster paid above-minimum royalties in the payment data from SoundExchange for 2018 and 2019 that I reviewed. Particularly given that the parties to the agreement did not even know what the Web V noncommercial rates would be at the time they finalized the CBI agreement, I suspect that the consequences of exceeding the monthly cap were not thoroughly explored by either side, so that the settlement's application of noncommercial rates set by the Judges in Web IV for webcasts exceeding the ATH threshold tells us little about the fee consequences that would emerge from negotiations between willing buyers and sellers. It certainly does not support application of commercial fees to noncommercial webcasters that exceed the monthly ATH threshold.

33. The NPR agreement requires NPR to pay SoundExchange an annual lump sum payment of \$800,000 in exchange for increasing amounts of "Music ATH," starting at 360 million in 2021 and increasing to 400 million in 2025. Joint Motion To Adopt Partial Settlement filed by SoundExchange, Inc. and NPR, Docket No. 19-CRB-0005-WR, at 7-8 (Sept. 23, 2019). "Music ATH" is defined as Aggregate Tuning Hours consisting of Website Performances of sound recordings. *Ibid.* at 6. This is a capped flat rate structure with a single payer acting on behalf of all NPR member stations, affiliates, and certain other public radio stations. Individual webcasters are unconstrained in usage provided that Music ATH aggregated across all eligible webcasters remains below the annual caps.

34. If the Judges determine that a lump sum similar to the NPR agreement is a reasonable fee structure for certain NCE webcasters (such as religious broadcasters), the NPR agreement

provides a useful starting point for rate setting. The NPR flat rate would need to be adjusted to account for four factors: differences in the capped levels of Music ATH permitted, differences in the number of covered webcasters, differences in administrative costs, and differences in persistent ability to pay.

35. To adjust for the first factor, multiply the NPR flat fee by the ratio of Music ATH caps:

$$ATH \text{ Adjusted Fee} = \$800,000 * \frac{\text{Annual Music ATH Cap for NRBNNMLC}}{\text{Annual Music ATH Cap for NPR}}$$

36. The second adjustment reflects the fact that the NPR settlement agreement covers a maximum number of 530 Originating Public Radio Stations named by CPB annually. Ibid. at 8. Public Broadcasters include NPR, American Public Media, Public Radio International, Public Radio Exchange and up to 530 Originating Public Radio Stations named by CPB annually. Ibid. at 7. The agreement provides a process for allowing Originating Public Radio Stations that wish to make Website Performances in any calendar year that were not initially named by CPB to participate in the settlement. This process requires CPB to pay an additional fee equal to the annual minimum fee applicable to Noncommercial Webcasters. Ibid. at 8.

37. The most natural way to account for differences in the number of webcasters covered by a single payer is to set a single-payer-specific cap on this number. For example, should NRBNNMLC elect to serve as a single payer under a new capped flat rate structure the Judges could calculate:

$$\begin{aligned} & \text{Maximum covered \# of NRBNNMLC webcasters} \\ &= 530 * \frac{\text{Annual Music ATH Cap for NRBNNMLC}}{\text{Annual Music ATH Cap for NPR}} \end{aligned}$$

-3-

If NRBNMLC exceeds this cap, the provisions of the NPR agreement (payment of annual minimum fees) would apply.

38. The settlement specifies that the License Fee also includes: "A discount that reflects the administrative convenience to the Collective of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance." Ibid. at 8. If the NRBNMLC is required or agrees to provide the same administrative conveniences by making annual lump sum payments, there would be no need to adjust the flat fee further. Otherwise, the value of these administrative conveniences would need to be quantified.

~~28.~~39. The last factor is difficult to quantify, but we can conclude that the adjusted rate is above an upper bound on reasonable rates. This is because stations named by CPB as participants in the NPR agreement have unique access to relatively stable funding through tax dollars allocated as grants by CPB. Indeed, qualification to receive funding from the CPB is a requirement for originating public radio stations to participate in the NPR settlement agreement. Ibid. at 6. CPB support is substantial, with \$69.31 million budgeted for direct grants to local public radio stations in FY 2018 (<https://www.cpb.org/aboutcpb/financials/budget/>). With this added (and stable) source of revenue, NPR willingness to pay for royalty rights likely is significantly higher than that of non-NPR NCE webcasters. This suggests that under the willing buyer willing seller standard, other noncommercial webcasters would seek to pay lower rates than those agreed to in the NPR settlement, and the resulting negotiated fee would be lower.

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C. By Economic Practice in a Variety of Contexts

~~29.40.~~ For-profit firms are often willing to sell their products and services to nonprofit organizations at a substantial discount.⁹ For example, Sand Associates offers one hour of free consulting to any nonprofit that asks.¹⁰ Todoist offers registered nonprofits a 50% discount on its software.¹¹ Google offers nonprofit organizations a comprehensive software package (G Suite for Nonprofits) with Microsoft Office compatible word processing, spreadsheet and slides capabilities as well as communications and on-line storage and many other features for free.¹² Dropbox and LinkedIn offer significant nonprofit discounts, GetResponse offers a 50% discount, and the list goes on.¹³ Indeed, Congress itself has invited such discounts with respect to a service used as an input for noncommercial educational broadcasters themselves – interconnection services. The Public Broadcasting Act of 1967, PL 90-129, expressly authorizes common carriers to provide those services to noncommercial radio broadcasters at “free or reduced rates” 47 U.S.S. § 396(h). The U.S. Senate Commerce Committee explained the provision by noting:

“the bill contains an express provision that nothing in the bill or the Communications Act shall be construed to prevent U.S. common carriers from rendering free or reduced rate communications interconnection services for noncommercial broadcasting. Your committee is confident that the communications common carriers will recognize the great public service potential

⁹ Thus Professor Brynjolfsson’s assertion in his Web II rebuttal testimony is plainly wrong. He asserts that “a discount to small non-commercial entities is not something that willing sellers ordinarily would offer for purely economic reasons. Rather, in a normal free market, agreements with large commercial webcasters would likely set the price and other, potentially competitive, webcasters would pay the same amount or leave the market. I continue to hold the view that it does not make sense from an economic perspective for noncommercial stations to pay less than commercial stations.” Brynjolfsson WRT in Web II at 40. To the contrary, discounts to non-commercial entities are, in fact, common.

¹⁰ <http://nonprofitinformation.com/a-free-offer-nonprofits-shouldnt-refuse/> accessed 9/22/2019,

¹¹ https://todoist.com/nonprofits?lang=en&utm_campaign=todoist_newsletter_2018_01_year_in_review&utm_medium=email&utm_source=sendgrid

¹² <https://www.google.com/nonprofits/offerings/apps-for-nonprofits/>

¹³ <https://fundraising.crowdrise.com/blog/20-nonprofit-discounts-we-think-you-should-know-about>

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that noncommercial educational broadcasting has and the importance of interconnection facilities to the system.”¹⁴

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~~30.41.~~ I have not located systematic studies of for-profit discounting practices, but I know that there are cases where goods and services provided to nonprofit organizations are discounted to cost, leaving no profit margin from these sales.¹⁵ Ignoring for the moment the costs of creating and recording new performances, the cost of extending webcasting rights to NCEs would be close to zero, consisting only of the administrative costs of processing the license. But the Judges have warned against rates that ignore the sunk costs of creating sound recordings.¹⁶ Even so, there is no reason why commercial and NCE webcasters should pay the same amount towards these sunk costs as long as the total paid by webcasters of all sorts is sufficient to cover them.

D. Lower-than-Commercial Royalty Rates Will Not Cannibalize the Commercial Submarket

~~31.42.~~ In Web IV, the Judges identified the threat of cannibalization as the reason for applying commercial rates to NCEs for listenership above the ATH threshold.¹⁷ They noted in Web II:

¹⁴ Senate Committee Report for the Public Broadcasting Act of 1967 at 1782. Emphasis added.

¹⁵ I currently chair a capital campaign to build a new community theater for dramatic performances in Westfield Indiana. Our lead donor is making a substantial donation through his family foundation but is also the head of the chief contractor for the project. His firm is discounting to cost, and he is asking subcontractors and materials suppliers to also discount to cost (still being negotiated, but he has at least some successes). G Suite is another example, where similar to performance rights, software is costly to create but there is no cost of sharing it once made and indeed, Google is charging nonprofits nothing for this software.

¹⁶ “[N]ot only are there some initial sunk investments, but there is a requirement of repeated substantial outlays year after year or, in other words, the repeated “sinking” of funds. If sellers are faced with the prospect of not recovering such sunk costs, then the incentive to produce such sound recordings is diminished.” 72 Fed. Reg. at 24094.

¹⁷ “As discussed, *supra* section V.B.1, the Judges apply commercial rates to noncommercial webcasters above the ATH threshold because economic logic dictates that outcome, not because it was observed in benchmark agreements.” 81 FR at 26395. The *supra* reference is to statements made in Web II that “there must be limits to the differential treatment for noncommercial to avoid ~~the~~ the chance that small noncommercial stations will cannibalize the webcasting market more generally and thereby adversely affect the value of the digital performance right in sound recordings.” ~~81.~~ ⁸¹ Fed. Reg. at 26392. In

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“SoundExchange[’s] ... own economic expert suggests a continuation of differentiated rates where the service offered by such Noncommercial Webcasters does not appear to pose any threat of making serious inroads into the business of those services paying the commercial rate.”¹⁸

32-43. The sole expert witness that the Judges relied upon for assertions that cannibalization

may be a threat appears to be Professor Brynjolfsson, who argued:

“[I]n the event that the CRB elects to set a separate royalty rate for very small noncommercial stations streaming for non-economic reasons, it should make certain that doing so interferes as little as possible with what should be a single market rate for commercial stations and larger noncommercial stations. One sensible approach would be to impose a cap on the amount of streaming that the noncommercial station can do while still paying at a lower rate. From an economic perspective, this reduces the chance that small noncommercial stations will cannibalize the webcasting market more generally and thus affect the fair market value of the digital performance right in sound recordings. A willing seller likely would insist on such a cap if it were, for policy or other reasons, determined to offer a discounted rate to very small noncommercial stations.” (Brynjolfsson WRT in Web II at 42).

33-44. Professor Brynjolfsson’s statement is wrong in almost every particular. First, there are clear economic reasons for setting a separate royalty rate for NCE webcasters, as discussed throughout my testimony. Second, there is no economic logic behind the assertion that there should be a single market rate. Willing sellers often negotiate different prices with different willing buyers even when there is no product differentiation. Price discrimination is even more common for differentiated products, and NCE webcasters are offering a different set of products to a different audience with different financial and regulatory constraints than commercial webcasters. Willing sellers would not always insist on “caps” or thresholds beyond which commercial rates would apply. The widespread practice of for-profits offering uncapped discounts to nonprofit buyers belies that conclusion. In addition, Professor

context, it appears that by “cannibalization” the Judges mean “convergence or overlap with the submarket for commercial webcasters and their indistinguishable noncommercial counterparts.” Ibid.

¹⁸ 72 Fed. Reg. at 24097.

-3-

WITNESS DIRECT TESTIMONY OF RICHARD STEINBERG
SUBMITTED BY NRB/NMLC

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Brynjolfsson is apparently unaware of the modern literature analyzing corporate social responsibility, corporate/nonprofit partnerships and sponsorships, and corporate donations both theoretically and empirically. This literature shows that for-profits treat nonprofits and social causes generously partly to increase profits, partly because of principal-agent problems within the for-profit firm and in the market for corporate control, and partly through choices of corporate structures and forms that make such generosity sustainable (Kitzmüller and Shimshack, 2012; Steinberg, 2015).

~~34.45.~~ Most importantly, the Professor's conclusion that charging NCEs lower rates will erode the fair market value of digital performance rights is generally backwards: Price discrimination based on willingness to pay differences across submarkets will *increase*, not *decrease* the fair market value of the digital performance right in sound recordings. This result is absolutely standard in economics and is even found in some textbooks for the first undergraduate course in microeconomics, although first textbooks demonstrate the result only for monopolies and we will have to go beyond those texts to consider the present application.¹⁹

~~35.46.~~ With a single statutory price, record companies receive financial surpluses that support the fair market value of the digital performance right in sound recordings. But this surplus is diminished by the necessity of attracting willing buyers from both the commercial and NCE submarkets when the latter have lower willingness to pay for performance licenses. In contrast, when two statutory prices are set, one for each submarket, the price set for

¹⁹ For example, the text I currently use (Krugman and Wells, p. 401) reports: "As long as different groups of customers respond differently to the price, a monopolist will find that it can capture more consumer surplus and increase its profit by charging them different prices."

commercial webcasters can be the same as the single price, while the NCEs are charged a lower price and hence buy more licenses. When more licenses are sold, the value of digital performance rights increases.²⁰

~~36.47.~~ There is a complication that must be considered here. In the previous paragraph, we are treating the commercial and NCE markets as if they were one and the same, as Professor Brynjolfsson mistakenly thinks they are. However, as distinct submarkets, there are separate demand curves for each submarket, and then we need to consider interactions across goods. To the extent that the cross-price elasticity of demand between the two submarkets is large and negative, something like cannibalization can occur. The cross-price elasticity of demand between the commercial and NCE subsectors measures the extent to which a decrease in the price charged to NCEs reduces the quantity of commercial-rate licenses desired for purchase. In turn, the cross-price elasticity of demand is larger when the two submarkets are better substitutes for each other. So, the question of cannibalization reduces to this: if the price charged by NCEs is reduced, will listenership at commercial webcasters fall off to such an extent that there is a significant reduction in the royalties paid under commercial sound recording performance licenses?

~~37.48.~~ Before turning to that question, I wish to emphasize that there is no scientific study in the record demonstrating that cannibalization has ever occurred in this market. There is no scientific study in the record that concludes that the cross-price elasticity between

²⁰ Were we talking about a price-discriminating monopoly, the surplus generated in support of the value of digital performance rights is definitely higher than that generated by a single price. But under statutory prices, this result is not guaranteed. Sufficient conditions for the conclusion are a) the statutory price for commercial webcasters is the same for a single price or price discrimination, b) the statutory price for NCE webcasters is lower than that for commercial webcasters and c) at the statutory price for NCE webcasters, demand is price elastic, that is, greater than 1 in absolute value.

commercial and NCE webcast listenership is large and negative. Professor Brynjolfsson's examples all concern NPR stations that are not my primary interest and are different than other NCEs in that they receive some government funding. But in any case, all the examples contain gaps in the chain of logic necessary to establish cannibalization. The asserted relationship is just that, asserted, and normally the CRB requires more thorough justification of assertions that affect the rates and rate structures it sets for statutory cases. Based on the significant differences between NCEs and commercial webcasters, I believe that past Judges appear to have placed too much weight on the unsubstantiated fears of SoundExchange and their witnesses.

~~38~~49. Although it is possible that the cross-price elasticity between the submarkets is negative (indicating some degree of substitutability among listeners), I don't believe it is very large on *a priori* grounds. Statutory NCE webcasters, particularly those not covered by the negotiated settlements of previous Web rounds (that is, excluding NPR and CBI) are mostly religious in orientation, differing from commercial webcasters in the music they play (hymns, spirituals, Contemporary Christian music), in the mix of talk and music, in the types of listeners desired (listener-donors attracted to the educational and religious mission of the NCE), and in their willingness to promote new niche and noncommercial recordings that bind listener-donors to their cause. These differences are inherent and persistent because the nondistribution constraint removes Nonprofit Board of Directors incentives to seek profits and protects the charitable mission from opportunistic corporate raiders.

~~39~~50. The examples presented by Professor Brynjolfsson include cases where non-local audiences are sought, but the differences between NCEs and commercial webcasters will persist despite any growth in the geographic scope of listenership. Other examples speak to

the use of similar software to attract advertisers (commercial) and underwriters (NCE), but the differences between the subsectors will persist in the face of growing similarity of technologies employed by the two market segments. Other examples concern high levels of listenership at a few NCE stations, but the differences between the subsectors will persist in the face of growing similarity in listenership numbers. Finally, he points to some surface similarities between commercial advertising and NCE underwriting, but the differences between the subsectors will persist in the face of these surface similarities.

[40-51.](#) The FCC restricts the messages that can accompany underwriting to keep the nature and profitability of such sponsorships distinct from advertising. Underwriting fees, whether paid by for-profits or private foundations, represent donations that can be acknowledged by NCEs but not extended as advertisements. Like other donations, they are limited by free-rider problems and do not grow proportionally with listenership.

[41-52.](#) FCC regulations requiring NCEs to advance and educational program and restricting NCE advertising revenues provide a strong presumption that the two submarkets do not overlap. If rights holders allege at some future time that cannibalization has become a real problem, they should be required to prove their point with clear and convincing evidence in light of this presumption. And if portions of the NCE market become indistinguishable from the commercial market, requiring payment of commercial royalty rates is a blunt hatchet and should be replaced by the scalpel of pruning overlapping programming.

[42-53.](#) In summary, prior Judges have applied commercial rates to noncommercial webcasters whose listenership exceeds an ATH threshold in an effort to eliminate conjectured overlap and convergence and to protect the fair market value of the digital performance right in sound recordings. They have relied on a witness's deeply flawed analysis of economic logic

and a handful of inappropriate examples. The sounder economic approach would be to presume that there is no convergence or overlap because of FCC-imposed programmatic and revenue restrictions and demand scientific evidence be presented before continuing this rate structure.

V. CHARACTERISTICS OF REASONABLE RATE PROPOSALS

A. Flat Fees, or Tiered Flat Fees Should be Employed

~~43.54.~~ The statutory rate for noncommercial webcasting has consisted of a flat fee of \$500 for any monthly listenership between 0 and 159,140 ATH, followed by commercial rates for listenership in excess of this threshold for some time now. Tiered flat fees apply one flat fee up to some level of ATH (threshold 1) followed by a different flat fee for usage up to some higher level of ATH (threshold 2), perhaps followed by one or more flat fees applied to one or more higher thresholds. The simplest example of a tiered flat fee would be \$500 for monthly usage between 0 and 159,140 ATH and an additional \$500 for each additional batch of 159,140 ATH or fraction thereof. This means that a webcaster transmitting 300,000 ATH would pay a flat fee of \$1000, and a webcaster transmitting 325,000 ATH would pay \$1500. As a general fee structure, the tiers can continue for arbitrarily high levels of ATH (“tiered flat fees”), or several tiers of flat fees can be followed by a usage rate (“tiered flat fees and rates”), or there can be a limited number of tiers with the highest tier being open-ended (“tiered and capped flat fees,” e.g., \$10,000 for any usage level in excess of the highest threshold).

~~44.55.~~ The Judges recognize that the current system of flat fees followed by commercial rates satisfies the willing buyer/willing seller and minimum fee standards specified in legislation because they have chosen this structure. I believe that each of the three tiered structures

would also satisfy these standards provided the structure is reasonably simple (willing buyers and sellers would not choose an overly complex approach) and in their basic forms, none of these tiered approaches are very complex. The bottom tier serves also as a minimum fee, and it is reasonable to suppose that a second tier would emerge in reasonably competitive markets if a larger proportion of NCEs and other noncommercial webcasters crossed the 159,140 ATH threshold.

~~45-56.~~ The current structure economizes on transactions costs and simplifies NCE finance because required payments are stable and predictable for those NCEs that do not expect to reach the threshold. Stable and predictable payment obligations are important to NCEs because they can finance them through regular on-air fundraising drives with accurate campaign goals. In contrast, unpredictable payment obligations can lead to irregularly scheduled emergency fundraising drives that alienate listener-donors and impair NCE mission attainment. Tiered flat fees or tiered and capped flat fees economize even more on transactions costs and simplify the fundraising task by extending stable predictability to a broader range of ATH levels. I recommend that the current system be replaced by tiered flat fees or tiered and capped flat fees, requiring payment of a flat fee of \$500 for each 159,140 monthly ATH or fraction thereof.

~~46-57.~~ Witnesses have testified in past CRB hearings, and the Judges have agreed, that \$500 is sufficient to cover SoundExchange's administrative costs (for both digital performance and ephemeral recording rights, including the vanishingly small cost of providing the buyer with digital copies for retransmission), and the cost of contributing an appropriate amount towards overall coverage of sunk costs. Administrative costs might conceivably increase with the licensee's listenership, but most of the administrative costs are fixed, so there are

substantial economies of listenership scale for each licensee. Thus, if anything, my proposal for tiered flat fees becomes more favorable for sellers as buyers move into higher tiers. However, fixing that bias makes the proposal too complicated, so the proposal represents a reasonable approximation to what willing buyers and sellers would often agree to in workably competitive markets.

B. If the Judges Reject Tiered Flat Fees Entirely, or if they Select Tiered Flat Fees and Rates, NCE Rates for Usage in Excess of Some Threshold Should be Lower than Commercial Rates.

[47-58.](#) Throughout this testimony, I have argued that NCEs constitute a distinct submarket regardless of listenership, that willingness to pay is lower in this than the commercial submarket, and hence that statutory rates for NCE webcasting should be lower than rates for commercial webcasting. I have quoted prior Judge rulings that appear to agree with these conclusions. The Judges have recognized that commercial rates beyond a threshold is only a proxy included to forestall overlap and convergence, and I have countered that there is no evidence that these things have occurred, and they are unlikely to occur according to economic logic.

[48-59.](#) In this section, I express a fallback position relevant if the Judges accept some, but not all, of my arguments as valid. Should the Judges continue to rule in favor of capped flat fees, I recommend that the rates applied to NCE listenership in excess of the threshold be set to levels significantly below commercial rates. I make the same recommendation if the Judges rule in favor of a tiered and capped rate structure, where usage rates become appropriate when listenership crosses the highest specified threshold.

[49-60.](#) With rare exceptions, NCEs run bare bone operations regardless of listenership because they cannot sell advertising in their broadcasts (and this carries over to their simulcasts, the

predominate or exclusive form of webcasting done by NCEs), because the products of underwriters cannot be promoted, because donations are limited due to the free-rider problem, and because programming decisions are designed to attract the right kinds of listeners and induce the right behaviors and beliefs in those listeners rather than simply to maximize listenership. The incidence of royalty payments lies on the listener-donors and other supporters of the NCE's educational and charitable mission, rather than on shareholders. Thus, NCE willingness to pay for digital sound recording webcast rights is lower than that of commercial webcasters. At the same time, economic theory and data support that for-profit sellers are often willing to offer lower prices to nonprofit buyers. When both seller willingness to accept and buyer willingness to pay are low, any deal struck by willing sellers and willing NCE buyers will likely be struck at lower-than-commercial rates. Market logic allows for this kind of price discrimination; indeed, it insists upon it.

~~50-61.~~ How much lower should NCE rates be (for listenership past a threshold)? It is difficult to provide firm numbers here, with few if any appropriate benchmarks from the NCE submarket. However, setting NCE rates (above the threshold) at 1/3 of commercial rates is a reasonable starting point for setting an appropriate ratio. In Web I, the recording industry's trade association offered to set the noncommercial rate at 1/3 the commercial rate with no cap or threshold beyond which commercial rates would apply. This can serve as a high upper bound on the revealed preference (high because the conditions for workable competition were not established). However, because the buyers rejected this proposal, the upper bound on willing buyer/willing seller NCE rates above a threshold might be lower than this.²¹

²¹ In any case, the fact that this deal was offered belies Professor Brynjolfsson's claim that no seller would offer flat fees without a cap.

C. If the Judges Reject Tiered Flat Fees, then Whether an NCE Exceeds Some Threshold Should Be Evaluated on an Annual, Rather than Monthly Basis.

~~51.62.~~ Should the Judges rule that usage rates (either commercial or lower) apply to usage in excess of a threshold in order to avoid the overlap and convergence and resulting cannibalization, I recommend that crossing the threshold should be evaluated on an annual rather than monthly basis.

~~52.63.~~ Currently, commercial rates apply to additional usage in any month that ATH exceeds 159,140 ATH. It is difficult for me to understand why NCE webcasters who cross the threshold in only a few months pose much of a threat to the value of digital broadcast rights. Brief flicks into supposed “overlap and convergence” evaluated on a monthly basis complicate NCE budgeting and lead to more frequent occurrence of the harmful side effect of restricting listenership, and there is no apparent benefit to offset these costs. In addition, annual evaluation would reduce transaction costs by a small amount (because of fewer checks to write and process, reduced volume of information to enter and store for auditor use, and the like). Hence my recommendation.

D. If the Judges Reject Tiered Flat fees, then the Listenership Threshold for paying Usage Rates Should be Increased.

~~53.64.~~ The 159,140 threshold was set long ago based on even older data and designed to address the purported need to keep the commercial and noncommercial markets distinct. The theory seems to be that when NCE listenership becomes sufficiently large, it will have a significant effect on the commercial market. The Judges considered the matter, and in their Web IV ruling left this threshold unchanged. As I understand it, the most important reason for their conclusion was that few noncommercial webcasters reached the 159,140 monthly ATH threshold despite the passage of time. Another reason for their ruling was the finding that the

recent SoundExchange/CBI agreement included the 159,140 ATH threshold, so this threshold was still appropriate.²²

~~54.65.~~ I recommend that the Judges reconsider the matter in their final ruling in this case. It is not the growth in NCE webcast listenership, but the growth in commercial listenership and the ratio of their levels that is important for overlap and convergence. Simply put, supposedly converging NCEs are “converging” to a target that is moving away from them and the two need not be converging at all. In addition, it should be noted that none of the buyers in the CBI agreement had listenerships close to the threshold, so it unclear that they gave any consideration to whether this threshold needed to be increased.

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²² “The SoundExchange/ CBI agreement lends support for some elements of SoundExchange’s rate proposal (e.g., a flat \$500 rate for noncommercial webcasters that transmit up to 159,140 ATH), but not for the proposed rate for usage beyond the ATH threshold.” 81 Fed. Reg. 26316 at 26394.

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VII. APPENDIX: WORKS CONSULTED

37 C.F.R. § 380(~~C~~), ~~§C~~, § 381

47 C.F.R. § 73.503

17 USC § 112, § 114

47 USC § 396, § 397, § 399b

Brynjolfsson WRT Web II (Public Version)

Emert WDT Web IV

Henes WDT Web IV

Joint Motion to Adopt Partial Settlement between SoundExchange and CBI Web IV

Katz WRT and WDT Web IV (Public Versions)

NRBNMLC ~~WDT~~Written Direct Statement Web IV

Rubinfeld WDT Web IV (Public Version)

Shapiro WDT Web IV (Public Version)

Report of the CARP Web I (Interim Public Version)

67 Fed. Reg. 45240 (Librarian Ruling)

72 Fed. Reg. 24084 (CRB Final Order Web II)

79 Fed. Reg. 23102 (CRB Final Order Web III)

81 Fed. Reg. 26316 (CRB Final Order Web IV)

Senate Committee Report for the Public Broadcasting Act of 1967

<http://nonprofitinformation.com/a-free-offer-nonprofits-shouldnt-refuse/>

https://todoist.com/nonprofits?lang=en&utm_campaign=todoist_newsletter_2018_01_year_in_review&utm_medium=email&utm_source=sendgrid

<https://www.google.com/nonprofits/offerings/apps-for-nonprofits>

<https://fundraising.crowdrise.com/blog/20-nonprofit-discounts-we-think-you-should-know-about>

<https://transition.fcc.gov/osp/inc-report/INoC-31-Nonprofit-Media.pdf>

<https://www.fcc.gov/sites/default/files/public-and-broadcasting.pdf>

<https://www.fcc.gov/media/radio/nature-of-educational-broadcasting>

<https://econweb.ucsd.edu/~vcrawfor/BGTBargainingSlides13.pdf>

Form 990 2017 Life Radio Ministries

Form 990 2018 Praise Network

Additional Works Consulted in Preparing Amended Testimony:

Educational Media Foundation Consolidated Financial Statements with Independent Auditors' Report Dec. 31, 2018 (SOUNDEX_W5_000034531)

Family Stations, Inc. Consolidated Financial Statements Dec. 31, 2017 and Dec. 31, 2016 (SOUNDEX_W5_000034558)

Joint Motion to Adopt Partial Settlement between SoundExchange, Inc. and National Public Radio, *In re* Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Performances (Web V), Docket: 19-CRB-0005-WR (2021-2025) (filed Sept. 23, 2019)

Joint Motion to Adopt Partial Settlement between SoundExchange, Inc. and College Broadcasters, Inc., *In re* Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Performances (Web V), Docket: 19-CRB-0005-WR (2021-2025) (filed Sept. 23, 2019)

KSBJ Educational Foundation Comparative Financial Data (ECFA.org) (SOUNDEX_W5_000036385)

Radio Training Network Comparative Financial Data (ECFA.org) (SOUNDEX_W5_000036387)

The Christian Broadcasting Network (CBN) Comparative Financial Data (ECFA.org) (SOUNDEX_W5_000036389)

University of Northwestern - St. Paul Comparative Financial Data (ECFA.org) (SOUNDEX_W5_000036392)

Beethoven.com LLC v. Librarian of Congress, 394 F.3d939 (2005)

Restricted Noncomm Stated Liability SOUNDEX_W5_000047347

Noncomm Edu stations SOUNDEX_W5_000070996 (Restricted)

EXHIBIT C

NRBNMLC Ex. 20

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

Determination of Rates and Terms for Digital
Performance of Sound Recordings and
Making of Ephemeral Copies to Facilitate
Performances (*Web V*)

Docket No. 19-CRB-0005-WR
(2021-2025)

JOINT MOTION TO ADOPT PARTIAL SETTLEMENT

SoundExchange, Inc. (“SoundExchange”) and College Broadcasters, Inc. (“CBI”) (collectively the “Parties”) have reached a partial settlement of the above-captioned proceeding (the “Proceeding”) for certain internet transmissions by college radio stations and other noncommercial educational webcasters. The Parties are pleased to submit the attached proposed regulatory language (the “Settlement”) for publication in the *Federal Register* for notice and comment in accordance with 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2). The Parties respectfully request that the Judges promptly adopt the Settlement in its entirety as a settlement of rates and terms under Sections 112(e) and 114 of the Copyright Act for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet, and related ephemeral recordings, as more specifically set forth in the Settlement. The Parties further request that the Judges endeavor to determine before the deadline for the filing of written rebuttal statements in this Proceeding (January 10, 2020) whether or not they will adopt the Settlement.

I. The Parties

SoundExchange and CBI are both participants in this Proceeding.

SoundExchange is a nonprofit organization that is jointly controlled by representatives of both recording artists and sound recording copyright owners. SoundExchange has approximately 149,000 artist members and approximately 112,000 rights owner members (including both record companies and artists who own the copyrights in their own recordings). The Copyright Royalty Judges have also designated SoundExchange as the sole collective to receive and distribute statutory royalties under Sections 112(e) and 114 to all artists and copyright owners.

CBI is a national nonprofit association, the members of which include college, university and high school radio and television stations and other electronic media organizations. Many of CBI's radio station and other members make internet transmissions subject to licensing under Sections 112(e) and 114.

II. Nature of the Settlement

The Parties have concluded an agreement concerning royalty rates and terms for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet during the period 2021-2025. That agreement generally continues in effect the current provisions of 37 C.F.R. Part 380 Subpart C, which were themselves adopted pursuant to 17 U.S.C. § 801(b)(7)(A) as part of the *Webcasting IV* proceeding, with two primary changes: (1) the minimum fee applicable to noncommercial educational webcasters will increase by \$50 per year throughout the rate period; and (2) consistent with the preferences previously expressed by the Judges, the generally-applicable provisions in Subpart A will apply to noncommercial educational webcasters to the extent consistent with Subpart C, and the corresponding provisions have been removed from Subpart C.

III. Prompt Adoption of the Settlement by the Copyright Royalty Judges

Pursuant to 17 U.S.C. § 801(b)(7)(A), the Copyright Royalty Judges have the authority “[t]o adopt as a basis for statutory terms and rates . . . an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding.” Such an agreement may serve as the basis of proposed regulations if other interested parties who “would be bound by the terms, rates or other determination” set by the agreement are afforded “an opportunity to comment on the agreement,” *id.* § 801(b)(7)(A)(i), and provided that, in the event a participant in the proceeding who would be bound by the settlement raises an objection, the Judges conclude that the rates and terms set forth in the settlement agreement “provide a reasonable basis for setting statutory terms or rates.” *Id.* § 801(b)(7)(A)(ii).

Encouraging settlements was a key goal of Congress when it adopted the current ratesetting procedures. H. Rep. No. 108-408, at 30 (Jan. 30, 2004) (“the Committee intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates”). Congress desired that royalty rates and terms be established by settlement, rather than litigation, whenever possible, to “reduce[] the need to conduct full-fledged ratesetting . . . proceedings” and thus “generate savings while expediting the disposition of proceedings.” H. Rep. No. 108-408, at 24. It bears emphasis that even a partial settlement like this one not only allows the parties to the settlement to conserve their resources, but also streamlines further proceedings to the benefit of the Judges and the other participants. Prompt action on settlements by the Judges also would allow the parties to a settlement know at an early date whether the rates and terms in the settlement will become the statutory rates and terms, and thus prevent prejudice

to their position as participants in a proceeding if those rates and terms are not ultimately adopted.

Congress contemplated that the Judges would not wait until the end of a proceeding to act on settlements reached much earlier. The Judges are specifically authorized to adopt settlements reached “at any time during the proceeding.” 17 U.S.C. § 801(b)(7)(A). Here, prompt action on the Settlement is important to both of the Parties.

Written rebuttal statements in this Proceeding are set to be filed on January 10, 2020. Knowing by that time whether or not the Judges will adopt the Settlement not only will allow the Parties to conserve their resources, but may also streamline the case to the benefit of the Judges and the other participants. Accordingly, the Parties respectfully request that the Judges publish the Settlement for comment, and promptly adopt the Settlement in its entirety as the statutory rates and terms for transmissions by noncommercial educational webcasters for the period 2021-2025. The Parties specifically request that the Judges endeavor to decide before January 10, 2020 whether or not they will adopt the Settlement.

Dated: September 23, 2019

Respectfully submitted,

/s/ David A. Handzo

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ATTACHMENT
PROPOSED REGULATIONS

[Note: The Parties have styled these proposed regulations as a replacement Subpart C to appear in the Copyright Royalty Judges' regulations at 37 C.F.R. Part 380. Consistent with current Subpart B, the Parties have set forth in Subpart C only regulatory provisions specific to Noncommercial Educational Webcasters, on the assumption that the generally-applicable provisions in Subpart A will apply to Noncommercial Educational Webcasters to the extent consistent with Subpart C.]

Subpart C—Noncommercial Educational Webcasters

§380.20 Definitions.

For purposes of this subpart, the following definitions apply:

Educational Transmission means an eligible nonsubscription transmission (as defined in 17 U.S.C. 114(j)(6)) made by a Noncommercial Educational Webcaster over the Internet.

Noncommercial Educational Webcaster means a noncommercial webcaster (as defined in 17 U.S.C. 114(f)(4)(E)(i)) that

(1) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Educational Transmissions and related Ephemeral Recordings;

(2) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations;

(3) Is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution;

(4) Is not a “public broadcasting entity” (as defined in 17 U.S.C. 118(f)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to its criteria; and

(5) Takes affirmative steps not to make total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month, if in any previous calendar year it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month.

§380.21 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Minimum fee for eligible Noncommercial Educational Webcasters.* Each Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any

individual channel or station for more than one calendar month in the immediately preceding calendar year and does not expect to make total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any calendar month during the applicable calendar year shall pay an annual, nonrefundable minimum fee in the amount set forth below (the “Minimum Fee”) for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Educational Transmissions, for each calendar year it makes Educational Transmissions subject to this subpart. For clarity, each individual stream (*e.g.*, HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate Minimum Fee. The Minimum Fee shall constitute the annual per channel or per station royalty for all Educational Transmissions totaling not more than 159,140 Aggregate Tuning Hours in a month on any individual channel or station, and for Ephemeral Recordings to enable such Educational Transmissions. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in §380.22(d)(1) shall pay a \$100 annual fee (the “Proxy Fee”) to the Collective. The Minimum Fee for each year of the royalty period is:

- (1) 2021: \$550;
- (2) 2022: \$600;
- (3) 2023: \$650;
- (4) 2024: \$700; and
- (5) 2025: \$750.

(b) *Consequences of unexpectedly exceeding ATH cap.* In the case of a Noncommercial Educational Webcaster eligible to pay royalties under paragraph (a) that unexpectedly makes total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any calendar month during the applicable calendar year:

(1) The Noncommercial Educational Webcaster shall, for such month and the remainder of the calendar year in which such month occurs, pay royalties in accordance, and otherwise comply, with the provisions of subpart B of this part applicable to Noncommercial Webcasters;

(2) The Minimum Fee paid by the Noncommercial Educational Webcaster for such calendar year will be credited to the amounts payable under the provisions of subpart B of this part applicable to Noncommercial Webcasters; and

(3) The Noncommercial Educational Webcaster shall, within 45 days after the end of each month, notify the Collective if it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on a channel or station during that month; pay the Collective any amounts due under the provisions of subpart B of this part applicable to Noncommercial Webcasters; and provide the Collective a statement of account pursuant to subpart A of this part.

(c) *Royalties for other Noncommercial Educational Webcasters.* A Noncommercial Educational Webcaster that is not eligible to pay royalties under paragraph (a) of this section shall pay royalties in accordance, and otherwise comply, with the provisions of subpart B of this part applicable to Noncommercial Webcasters.

(d) *Estimation of performances.* In the case of a Noncommercial Educational Webcaster that is required to pay royalties under paragraph (b) or (c) on a per-Performance basis, that is unable to calculate actual total Performances, and that is not required to report actual total Performances under §380.22(d)(3), the Noncommercial Educational Webcaster may pay its applicable royalties on an ATH basis, provided that the Noncommercial Educational Webcaster shall calculate such royalties at the applicable per-Performance rates based on the assumption that the number of sound recordings performed is 12 per hour. The Collective may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis. In addition, and for the avoidance of doubt, a Noncommercial Educational Webcaster offering more than one channel or station shall pay per-Performance royalties on a per-channel or -station basis.

(e) *Allocation between ephemeral recordings and performance royalty fees.* The Collective must credit 5% of all royalty payments as payment for Ephemeral Recordings and credit the remaining 95% to section 114 royalties. All Ephemeral Recordings that a Licensee makes which are necessary and commercially reasonable for making Educational Transmissions are included in the 5%.

§380.22 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Noncommercial Educational Webcaster shall make the royalty payments due under §380.21 to the Collective. For purposes of this subpart, the term “Collective” refers to SoundExchange, Inc.

(b) *Minimum fee.* Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account, by January 31st of each calendar year, except that payment of the Minimum Fee, and Proxy Fee if applicable, by a Noncommercial Educational Webcaster that was not making Educational Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Noncommercial Educational Webcaster commences doing so. At the same time the Noncommercial Educational Webcaster must identify all its stations making Educational Transmissions and identify which of the reporting options set forth in paragraph (d) of this section it elects for the relevant year (provided that it must be eligible for the option it elects).

(c) *Statements of account.* Any payment due under §380.22(a) shall be accompanied by a corresponding statement of account on a form provided by the Collective. A statement of account shall contain the following information:

(1) The name of the Noncommercial Educational Webcaster, exactly as it appears on the notice of use, and if the statement of account covers a single station only, the call letters or name of the station;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The signature of a duly authorized representative of the applicable educational institution;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) The title or official position held by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned duly authorized representative of the applicable educational institution, have examined this statement of account; hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence; and further certify that the licensee entity named herein qualifies as a Noncommercial Educational Webcaster for the relevant year, and did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay any required additional royalties.

(d) *Reporting by Noncommercial Educational Webcasters in general*—(1) *Reporting waiver*. In light of the unique business and operational circumstances with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 80,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 80,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a nonrefundable, annual Proxy Fee of \$100 in lieu of providing reports of use for the calendar year pursuant to the regulations §370.4 of this chapter. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 80,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in paragraph (d)(1) of this section during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Educational Transmissions exceeding 80,000 total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (b) of this section for paying the Minimum Fee for the applicable calendar year and

shall be accompanied by a certification on a form provided by the Collective, signed by a duly authorized representative of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Educational Transmissions in the future.

(2) *Sample-basis reports.* A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to provide reports of use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at §370.4 of this chapter, except that, notwithstanding §370.4(d)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station name and play frequency. Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These reports of use shall be submitted to the Collective no later than January 31st of the year immediately following the year to which they pertain.

(3) *Census-basis reports.* If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to paragraph (d)(3) of this section:

(i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;

(ii) The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or

(iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraph (d)(1) or (2) of this section.

A Noncommercial Educational Webcaster required to report pursuant to paragraph (d)(3) of this section shall provide reports of use to the Collective quarterly on a census reporting basis in accordance with §370.4 of this chapter, except that, notwithstanding §370.4(d)(2), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total Performances, and may in lieu thereof provide channel or station name and play frequency, during the first calendar year it reports in accordance with paragraph (d)(3) of this section. For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with paragraph (d)(3) of this section for a full calendar year, it must thereafter include ATH or actual total Performances in its reports of use. All reports of use under paragraph (d)(3) of this section shall be submitted to the Collective no later than the 45th day after the end of each calendar quarter.

(e) *Server logs.* Noncommercial Educational Webcasters shall retain for a period of no less than three full calendar years server logs sufficient to substantiate all information relevant to

eligibility, rate calculation and reporting under this subpart. To the extent that a third-party Web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of no less than three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

(f) *Terms in general.* Subject to the provisions of this subpart, terms governing late fees, distribution of royalties by the Collective, unclaimed funds, record retention requirements, treatment of Licensees' confidential information, audit of royalty payments and distributions, and any definitions for applicable terms not defined in this subpart shall be those set forth in subpart A.

Proof of Delivery

I hereby certify that on Monday, September 23, 2019, I provided a true and correct copy of the Joint Motion to Adopt Partial Settlement to the following:

Sirius XM Radio Inc., represented by Todd Larson, served via Electronic Service at todd.larson@weil.com

Educational Media Foundation, represented by David Oxenford, served via Electronic Service at doxenford@wbklaw.com

Sony Music Entertainment, represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

UMG Recordings, Inc., represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

iHeartMedia, Inc., represented by John Thorne, served via Electronic Service at jthorne@kellogghansen.com

National Public Radio, Inc., represented by Gregory A Lewis, served via Electronic Service at glewis@npr.org

Pandora Media, LLC, represented by Todd Larson, served via Electronic Service at todd.larson@weil.com

Warner Music Group Corp., represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

circle god network inc d/b/a david powell, represented by david powell, served via Electronic Service at davidpowell008@yahoo.com

Jagjaguwar Inc., represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

American Association of Independent Music ("A2IM"), The, represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

SAG-AFTRA, represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

National Religious Broadcasters Noncommercial Music License Committee, represented by Karyn K Ablin, served via Electronic Service at ablin@fhhlaw.com

Google Inc., represented by Kenneth L Steinthal, served via Electronic Service at ksteinthal@kslaw.com

American Federation of Musicians of the United States and Canada, The, represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

National Association of Broadcasters, represented by Andrew Gass, served via Electronic Service at andrew.gass@lw.com

Radio Paradise Inc., represented by David Oxenford, served via Electronic Service at doxenford@wbklaw.com

Signed: /s/ David A. Handzo

EXHIBIT D

NRBNMLC Ex. 21

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

Determination of Rates and Terms for Digital
Performance of Sound Recordings and
Making of Ephemeral Copies to Facilitate
Performances (*Web V*)

Docket No. 19-CRB-0005-WR
(2021-2025)

JOINT MOTION TO ADOPT PARTIAL SETTLEMENT

SoundExchange, Inc. (“SoundExchange”), National Public Radio, Inc. (“NPR”) and the Corporation for Public Broadcasting (“CPB”) (collectively the “Parties”) have reached a partial settlement of the above-captioned proceeding (the “Proceeding”) for certain internet transmissions by NPR, American Public Media, Public Radio International, Public Radio Exchange, and certain public radio stations (“Public Broadcasters”). The Parties are pleased to submit the attached proposed regulatory language (the “Settlement”) for publication in the *Federal Register* for notice and comment in accordance with 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2). The Parties respectfully request that the Judges promptly adopt the Settlement in its entirety as a settlement of rates and terms under Sections 112(e) and 114 of the Copyright Act for eligible transmissions made by Public Broadcasters through their websites, and related ephemeral recordings, as more specifically set forth in the Settlement. The Parties further request that the Judges endeavor to determine before the deadline for the filing of written rebuttal statements in this Proceeding (January 10, 2020) whether they will adopt the Settlement.

I. The Parties

SoundExchange and NPR both filed petitions to participate in this Proceeding.

SoundExchange is a nonprofit organization that is jointly controlled by representatives of both recording artists and sound recording copyright owners. SoundExchange has approximately 149,000 artist members and approximately 112,000 rights owner members (including both record companies and artists who own the copyrights in their own recordings). The Copyright Royalty Judges have also designated SoundExchange as the sole collective to receive and distribute statutory royalties under Sections 112(e) and 114 to all artists and copyright owners.

NPR is the leading membership and representation organization for public radio. It is a nonprofit membership corporation that produces and distributes noncommercial programming through public radio stations nationwide. NPR member stations are also significant producers of local, regional and national news content, as well as music and other specialized programming.

CPB is a private, nonprofit entity that was founded by Congress and is funded by the federal government. CPB is the largest single source of funding for public radio, television and related online and mobile services. CPB provides significant funding to Public Broadcasters and will pay all royalties under the Settlement.

II. Nature of the Settlement

Public radio consists of a unique set of entities, and has a unique history, organizational structure and funding model. Among other things, public radio receives substantial funding from CPB. Through CPB, the federal government has always paid sound recording royalties for public radio. As a result, public radio presents unique business, economic and political circumstances unlike other participants in this Proceeding or the marketplace.

Due to these unique circumstances, there is a long history of rate settlements between SoundExchange and NPR/CPB. The Settlement continues the structure of previous settlements while increasing the payment to be made by CPB. Because the Settlement applies to only a

closed group of licensees, and has only a single payor (CPB), the Settlement is being submitted to the Judges for adoption as a statutory rate and terms only so that it will be binding on all artists and copyright owners, including those that are not members of SoundExchange. *See* 17 U.S.C. § 114(f)(1)(B).

The parties have also agreed to continue their prior reporting arrangements, which provide for significant consolidated reporting of usage by Public Broadcasters through CPB in a manner that takes into account the unique organizational structure of public radio. In view of the Judges’ statements that SoundExchange and licensees may agree among themselves to vary the reporting requirements under applicable regulations,¹ and that the Judges do not wish to codify in the *Code of Federal Regulations* arrangements pertinent only to specific licensees,² the Parties have not included the details of their agreed-upon reporting arrangements in the Settlement submitted with this motion.

III. Prompt Adoption of the Settlement by the Copyright Royalty Judges

Pursuant to 17 U.S.C. § 801(b)(7)(A), the Copyright Royalty Judges have the authority “[t]o adopt as a basis for statutory terms and rates . . . an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding.” Such an agreement may serve as the basis of proposed regulations if other

¹ *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 74 Fed. Reg. 52,418, 52,419 (Oct. 13, 2009) (“digital audio services are free to negotiate other formats and technical standards for data maintenance and delivery and may use those in lieu of regulations adopted by the Judges, upon agreement with the Collective”); *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 71 Fed. Reg. 59,010, 59,012 (Oct. 6, 2006) (“copyright owners and services are always free to negotiate different format and delivery requirements that suit their particular needs and situations”).

² 74 Fed. Reg. at 52,419 (“We have no intention of codifying these negotiated variances in the future unless and until they come into such standardized use as to effectively supersede the existing regulations.”).

interested parties who “would be bound by the terms, rates or other determination” set by the agreement are afforded “an opportunity to comment on the agreement,” *id.* § 801(b)(7)(A)(i), and provided that, in the event a participant in the proceeding who would be bound by the settlement raises an objection, the Judges conclude that the rates and terms set forth in the settlement agreement “provide a reasonable basis for setting statutory terms or rates.” *Id.* § 801(b)(7)(A)(ii).

Encouraging settlements was a key goal of Congress when it adopted the current ratesetting procedures. H. Rep. No. 108-408, at 30 (Jan. 30, 2004) (“the Committee intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates”). Congress desired that royalty rates and terms be established by settlement, rather than litigation, whenever possible, to “reduce[] the need to conduct full-fledged ratesetting . . . proceedings” and thus “generate savings while expediting the disposition of proceedings.” H. Rep. No. 108-408, at 24.

Written rebuttal statements in this Proceeding are set to be filed on January 10, 2020. Knowing by that time whether or not the Judges will adopt the Settlement not only will allow the Parties to conserve their resources, but may also streamline the case to the benefit of the Judges and the other participants. Accordingly, the Parties respectfully request that the Judges publish the Settlement for comment, and promptly adopt the Settlement in its entirety as the statutory rates and terms for Eligible Transmissions by Public Broadcasters for the period 2021-2025. The Parties specifically request that the Judges endeavor to decide before January 10, 2020 whether or not they will adopt the Settlement.

Dated: September 23, 2019

Respectfully submitted,

/s/ David A. Handzo

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ATTACHMENT
PROPOSED REGULATIONS

[Note: The Parties have styled these proposed regulations as a replacement Subpart D to appear in the Copyright Royalty Judges' regulations at 37 C.F.R. Part 380. Consistent with current Subpart B, the Parties have set forth in Subpart D only regulatory provisions specific to Public Broadcasters, on the assumption that the generally-applicable provisions in Subpart A will apply to Public Broadcasters to the extent consistent with Subpart D.]

Subpart D— Public Broadcasters

§ 380.30 Definitions.

For purposes of this subpart, the following definitions apply:

Authorized Website is any Website operated by or on behalf of any Public Broadcaster that is accessed by Website Users through a Uniform Resource Locator (“URL”) owned by such Public Broadcaster and through which Website Performances are made by such Public Broadcaster.

CPB is the Corporation for Public Broadcasting.

Music ATH is ATH of Website Performances of sound recordings of musical works.

NPR is National Public Radio, Inc.

Originating Public Radio Station is a noncommercial terrestrial radio broadcast station that—

- (1) Is licensed as such by the Federal Communications Commission;
- (2) Originates programming and is not solely a repeater station;
- (3) Is a member or affiliate of NPR, American Public Media, Public Radio International, or Public Radio Exchange, a member of the National Federation of Community Broadcasters, or another public radio station that is qualified to receive funding from CPB pursuant to its criteria;
- (4) Qualifies as a “noncommercial webcaster” under 17 U.S.C. 114(f)(4)(E)(i); and
- (5) Either—
 - (i) Offers Website Performances only as part of the mission that entitles it to be exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); or
 - (ii) In the case of a governmental entity (including a Native American Tribal governmental entity), is operated exclusively for public purposes.

Person is a natural person, a corporation, a limited liability company, a partnership, a trust, a joint venture, any governmental authority or any other entity or organization.

Public Broadcasters are NPR, American Public Media, Public Radio International, and Public Radio Exchange, and up to 530 Originating Public Radio Stations as named by CPB. CPB shall notify SoundExchange annually of the eligible Originating Public Radio Stations to be considered Public Broadcasters hereunder (subject to the numerical limitations set forth herein). The number of Originating Public Radio Stations treated hereunder as Public Broadcasters shall not exceed 530 for a given year without SoundExchange's express written approval, except that CPB shall have the option to increase the number of Originating Public Radio Stations that may be considered Public Broadcasters as provided in § 380.31(c).

Side Channel is any Internet-only program available on an Authorized Website or an archived program on such Authorized Website that, in either case, conforms to all applicable requirements under 17 U.S.C. 114.

Term is the period January 1, 2021, through December 31, 2025.

Website is a site located on the World Wide Web that can be located by a Website User through a principal URL.

Website Performances are all public performances by means of digital audio transmissions of sound recordings, including the transmission of any portion of any sound recording, made through an Authorized Website in accordance with all requirements of 17 U.S.C. 114, from servers used by a Public Broadcaster (provided that the Public Broadcaster controls the content of all materials transmitted by the server), or by a contractor authorized pursuant to Section 380.31(f), that consist of either the retransmission of a Public Broadcaster's over-the-air terrestrial radio programming or the digital transmission of nonsubscription Side Channels that are programmed and controlled by the Public Broadcaster; provided, however, that a Public Broadcaster may limit access to an Authorized Website, or a portion thereof, or any content made available thereon or functionality thereof, solely to Website Users who are contributing members of a Public Broadcaster. This term does not include digital audio transmissions made by any other means.

Website Users are all those who access or receive Website Performances or who access any Authorized Website.

§ 380.31 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* The total license fee for all Website Performances by Public Broadcasters during each year of the Term, up to the total Music ATH set forth below for the relevant calendar year, and Ephemeral Recordings made by Public Broadcasters solely to facilitate such Website Performances, shall be \$800,000 (the "License Fee"), unless additional payments are required as described in paragraph (c) of this section. The total Music ATH limits are:

- (1) 2021: 360,000,000;
- (2) 2022: 370,000,000;
- (3) 2023: 380,000,000;
- (4) 2024: 390,000,000; and
- (5) 2025: 400,000,000.

(b) *Calculation of License Fee.* It is understood that the License Fee includes:

- (1) An annual minimum fee for each Public Broadcaster for each year during the Term;
- (2) Additional usage fees for certain Public Broadcasters; and
- (3) A discount that reflects the administrative convenience to the Collective of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.

(c) *Increase in Public Broadcasters.* If the total number of Originating Public Radio Stations that wish to make Website Performances in any calendar year exceeds the number of such Originating Public Radio Stations considered Public Broadcasters in the relevant year, and the excess Originating Public Radio Stations do not wish to pay royalties for such Website Performances apart from this subpart, CPB may elect by written notice to the Collective to increase the number of Originating Public Radio Stations considered Public Broadcasters in the relevant year effective as of the date of the notice. To the extent of any such elections, CPB shall make an additional payment to the Collective for each calendar year or part thereof it elects to have an additional Originating Public Radio Station considered a Public Broadcaster, in the amount of the annual minimum fee applicable to Noncommercial Webcasters under subpart B for each additional Originating Public Radio Station per year. Such payment shall accompany the notice electing to have an additional Originating Public Radio Station considered a Public Broadcaster.

(d) *Allocation between ephemeral recordings and performance royalty fees.* The Collective must credit 5% of all royalty payments as payment for Ephemeral Recordings and credit the remaining 95% to section 114 royalties. All Ephemeral Recordings that a Licensee makes which are necessary and commercially reasonable for making noninteractive digital transmissions are included in the 5%.

(e) *Effect of non-performance by any Public Broadcaster.* In the event that any Public Broadcaster violates any of the material provisions of 17 U.S.C. 112(e) or 114 or this subpart that it is required to perform, the remedies of the Collective shall be specific to that Public Broadcaster only, and shall include, without limitation, termination of that Public Broadcaster's right to be treated as a Public Broadcaster hereunder upon written notice to CPB. The Collective

and Copyright Owners also shall have whatever rights may be available to them against that Public Broadcaster under applicable law. The Collective's remedies for such a breach or failure by an individual Public Broadcaster shall not include termination of the rights of other Public Broadcasters to be treated as Public Broadcasters hereunder, except that if CPB fails to pay the License Fee or otherwise fails to perform any of the material provisions of this subpart, or such a breach or failure by a Public Broadcaster results from CPB's inducement, and CPB does not cure such breach or failure within 30 days after receiving notice thereof from the Collective, then the Collective may terminate the right of all Public Broadcasters to be treated as Public Broadcasters hereunder upon written notice to CPB. In such a case, a prorated portion of the License Fee for the remainder of the Term (to the extent paid by CPB) shall, after deduction of any damages payable to the Collective by virtue of the breach or failure, be credited to statutory royalty obligations of Public Broadcasters to the Collective for the Term as specified by CPB.

(f) *Use of contractors.* The right to rely on this subpart is limited to Public Broadcasters, except that a Public Broadcaster may employ the services of a third Person to provide the technical services and equipment necessary to deliver Website Performances on behalf of such Public Broadcaster, but only through an Authorized Website. Any agreement between a Public Broadcaster and any third Person for such services shall:

(1) Obligate such third Person to provide all such services in accordance with all applicable provisions of the statutory licenses and this subpart;

(2) Specify that such third Person shall have no right to make Website Performances or any other performances or Ephemeral Recordings on its own behalf or on behalf of any Person or entity other than a Public Broadcaster through the Public Broadcaster's Authorized Website by virtue of its services for the Public Broadcaster, including in the case of Ephemeral Recordings, pre-encoding or otherwise establishing a library of sound recordings that it offers to a Public Broadcaster or others for purposes of making performances, but instead must obtain all necessary licenses from the Collective, the copyright owner or another duly authorized Person, as the case may be;

(3) Specify that such third Person shall have no right to grant any sublicenses under the statutory licenses; and

(4) Provide that the Collective is an intended third-party beneficiary of all such obligations with the right to enforce a breach thereof against such third Person.

§ 380.32 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* CPB shall pay the License Fee to the Collective in five equal installments of \$800,000 each, which shall be due December 31, 2020, and annually thereafter through December 31, 2024. For purposes of this subpart, the term "Collective" refers to SoundExchange, Inc.

(b) *Reporting.* CPB and Public Broadcasters shall submit reports of use and other information concerning Website Performances as agreed upon with the Collective.

(c) *Terms in general.* Subject to the provisions of this subpart, terms governing late fees, distribution of royalties by the Collective, unclaimed funds, record retention requirements, treatment of Licensees' confidential information, audit of royalty payments and distributions, and any definitions for applicable terms not defined in this subpart shall be those set forth in subpart A.

Proof of Delivery

I hereby certify that on Monday, September 23, 2019, I provided a true and correct copy of the Joint Motion to Adopt Partial Settlement to the following:

National Religious Broadcasters Noncommercial Music License Committee, represented by Karyn K Ablin, served via Electronic Service at ablin@fhhlaw.com

Google Inc., represented by Kenneth L Steinthal, served via Electronic Service at ksteinthal@kslaw.com

Sony Music Entertainment, represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

American Federation of Musicians of the United States and Canada, The, represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

Pandora Media, LLC, represented by Todd Larson, served via Electronic Service at todd.larson@weil.com

circle god network inc d/b/a david powell, represented by david powell, served via Electronic Service at davidpowell008@yahoo.com

Jagjaguwar Inc., represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

iHeartMedia, Inc., represented by John Thorne, served via Electronic Service at jthorne@kellogghansen.com

UMG Recordings, Inc., represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

Warner Music Group Corp., represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

SAG-AFTRA, represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

National Association of Broadcasters, represented by Andrew Gass, served via Electronic Service at andrew.gass@lw.com

Sirius XM Radio Inc., represented by Todd Larson, served via Electronic Service at todd.larson@weil.com

Radio Paradise Inc., represented by David Oxenford, served via Electronic Service at doxenford@wbklaw.com

College Broadcasters, Inc., represented by David D Golden, served via Electronic Service at dgolden@constantinecannon.com

American Association of Independent Music ("A2IM"), The, represented by David A. Handzo, served via Electronic Service at dhandzo@jenner.com

Educational Media Foundation, represented by David Oxenford, served via Electronic Service at doxenford@wbklaw.com

Signed: /s/ David A. Handzo

Proof of Delivery

I hereby certify that on Wednesday, December 11, 2019, I provided a true and correct copy of the Amended Written Direct Testimony of Richard Steinberg to the following:

Google Inc., represented by David P Mattern, served via Electronic Service at dmattern@kslaw.com

American Association of Independent Music ("A2IM"), The, represented by Andrew B Cherry, served via Electronic Service at ACherry@jenner.com

SoundExchange, Inc., represented by Andrew B Cherry, served via Electronic Service at ACherry@jenner.com

Sony Music Entertainment, represented by Andrew B Cherry, served via Electronic Service at ACherry@jenner.com

National Public Radio, Inc., represented by David P Mattern, served via Electronic Service at dmattern@kslaw.com

Radio Paradise Inc., represented by David Oxenford, served via Electronic Service at doxenford@wbklaw.com

American Federation of Musicians of the United States and Canada, The, represented by Andrew B Cherry, served via Electronic Service at ACherry@jenner.com

National Association of Broadcasters, represented by Ivana Dukanovic, served via Electronic Service at ivana.dukanovic@lw.com

iHeartMedia, Inc., represented by John Thorne, served via Electronic Service at jthorne@kellogghansen.com

Corporation for Public Broadcasting, represented by Kenneth L Steinthal, served via Electronic Service at ksteinthal@kslaw.com

SAG-AFTRA, represented by Andrew B Cherry, served via Electronic Service at ACherry@jenner.com

Pandora Media, LLC, represented by Bruce Rich, served via Electronic Service at
bruce.rich@weil.com

UMG Recordings, Inc., represented by Andrew B Cherry, served via Electronic Service at
ACherry@jenner.com

Warner Music Group Corp., represented by Andrew B Cherry, served via Electronic Service
at ACherry@jenner.com

Sirius XM Radio Inc., represented by Bruce Rich, served via Electronic Service at
bruce.rich@weil.com

circle god network inc d/b/a david powell, represented by david powell, served via Electronic
Service at davidpowell008@yahoo.com

Educational Media Foundation, represented by Jennifer Tatel, served via Electronic Service
at jtatel@wbklaw.com

Jagjaguwar Inc., represented by Andrew B Cherry, served via Electronic Service at
ACherry@jenner.com

College Broadcasters, Inc., represented by David D Golden, served via Electronic Service
at dgolden@constantinecannon.com

Signed: /s/ Karyn K Ablin